Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

RICHARD REAHARD and ANN P. REAHARD.

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Takings Clause of the Fifth Amendment includes the absolute requirement that the plaintiff in an action for just compensation retry his case in state court even though he had originally filed the lawsuit in state court and the case was removed by the government defendant to federal court?

2. Whether such a requirement violates the Fifth Amendment's guarantee that compensation be paid whenever private property is taken for public use?

3. Whether the second prong of the ripeness requirement announced in *Williamson County Regional Planning Commission v. Hamilton Bank* — which now leads to the filing of futile and duplicative lawsuits and bars plaintiffs from obtaining relief for the taking of their Fifth Amendment property rights — was modified by this Court's subsequent holdings in *First English Evangelical Lutheran Church v. County of Los Angeles* and *Lucas v. South Carolina Coastal Council*?

4. Whether this Court should provide badly-needed guidance to the lower courts which are new split on how to apply *Williamson County*?

PARTIES TO THE ACTION

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of this Court, Petitioners have no parent companies nor any non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Richard Reahard and Ann P. Reahard hereby petition this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eleventh Circuit or alternatively, for a summary reversal of the decision below.

OPINIONS AND ORDERS BELOW

1. The opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 2, 1994 and published at 30 F.3d 1412 (11th Cir. 1994), is reproduced in Appendix A.

2. The decision of the magistrate judge on remand, dated April 22, 1993 but unpublished, is reproduced in Appendix B.

3. The addendum opinion of the United States Court of Appeals for the Eleventh Circuit to the magistrate judge, issued on December 8, 1992 and published at 978 F.2d 1212 (11th Cir. 1992), is reproduced in Appendix C.

4. The first decision of the United States Court of Appeals for the Eleventh Circuit vacating and remanding the magistrate judge's decision, rendered on August 14, 1992 and published at 968 F.2d 1131 (11th Cir. 1992), is reproduced in Appendix D.

5. The final judgment of the magistrate judge, issued on June 6, 1991 is unpublished, and is reproduced in Appendix E.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was issued on September 2, 1994. On December 1, 1994, Justice Kennedy extended the time for filing a petition for writ of certiorari to and including February 17, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "[N]or shall private property

be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case is a classic example of how it can be virtually impossible for a property owner to vindicate his Fifth Amendment rights in court due to the endless procedural requirements facing him. It affords this Court an opportunity to provide badly needed guidance as to whether the requirement that a plaintiff first seek review of his taking claim in state court before filing in federal court — as set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) — has been modified by this Court's more recent takings decisions. *Williamson County* places two ripeness hurdles in the way of a taking claim brought in federal court against states and their political subdivisions. The first requirement of *Williamson County*, that a claimant exhaust state administrative remedies before filing an action in federal court, was satisfied in this case.[1] The second, and independent, requirement of *Williamson County* dictates that plaintiffs "seek compensation through the [judicial] procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194.

Neither *Williamson County* nor have subsequent takings

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[1] The district court found as a fact that Lee County rendered a final administrative decision in this case on January 31, 1989. Order of the United States District Court, January 16, 1991. See Appendix E, *infra*. The court below rejected this factual finding without explanation in a *de novo* review. Petitioners believe that the court below's *de novo* review of this finding of fact was clear error.

decisions by this Court treated *Williamson County* as mandating a jurisdictional requirement. Indeed, in *Lucas v. South Carolina Coastal Council,* 505 U.S. ____, 112 S. Ct. 2886 (1992), this Court explicitly treated the ripeness requirement of (*Williamson County*) as a prudential concern:

> Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act. That there is a discretionary "special permit" procedure by which he may regain — for the future, at least — beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.

Id. at 2891-92 (citations omitted).

In sharp contrast with this Court's 1992 ripeness holding in *Lucas*, the court below failed to treat the second hurdle of the *Williamson County* ripeness requirement as a prudential matter — viewing it instead as an absolute jurisdictional bar, even though Petitioners did present Article III injury-in-fact and the case had already been tried twice before: "[U]ntil they have pursued their state remedy, the federal courts are without subject matter jurisdiction." *Reahard v. Lee County*, 30 F.3d 1412, 1418 (1994), reproduced in Appendix A, *infra*.

Had the court below treated the second prong of *Williamson County* as a prudential matter, it would have been required to defer to the trial court's factual determination that the case was sufficiently concrete for adjudication by the court, especially now that the case has been fully tried on two previous occasions (once before a jury) and reviewed twice on appeal.[2] Moreover, the court below ignored the fact that Petitioners originally filed this lawsuit in state court, and

were prevented from pursuing the case when Respondent removed the action to federal court in October of 1989 on the ground that the action involved a federal question arising under the Fifth Amendment to the United States Constitution and thus did not belong in state court. Likewise, at the time the lawsuit was filed, the State of Florida recognized no cause of action for inverse condemnation,[3] rendering his state action futile as well as impossible.

By failing to understand *Williamson County* in light of later decisions of this Court, the court below has joined many federal courts across the nation which continue to apply

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[2] The court below mandated in the first appeal that the trial court undertake an exhaustive review of the facts of this case looking specifically at:

1) the economic impact of the regulation on the claimant; . . . 2) the extent to which the regulation has interfered with his investment-backed expectations . . . . [3]) the history of the property — when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; [4]) the history of development — what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; [5]) the history of zoning and regulation — how and when was the land classified? How was use proscribed? What changes in classifications occurred?; [6]) how did development change when the title passed; [7]) what is the present nature and extent of the property; [8]) what were the reasonable expectations of the landowner under state common law?; [9]) what were the reasonable expectations of the neighboring landowners under state common law?; and [10]) perhaps most importantly what was the diminution in the investment-backed expectations of the landowner if any, after passage of the regulation?

Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992), reproduced in Appendix D, *infra*.

[3] *See Lee County v. Morales*, 557 So.2d 652, 656 (Fla. Dist. Ct.App. 1990) ("A zoning change cannot give rise to a cause of action for inverse condemnation.").

Williamson County as if takings jurisprudence had not developed beyond the state of law in 1985. As discussed below, the holding in *Williamson County* has been interpreted inconsistently by federal courts as a jurisdictional, prudential and even a procedural requirement. Much of the inconsistency and confusion arises from the uncertainty at the time of the *Williamson County* decision surrounding the fundamental nature of a just compensation case. This Court has addressed many of these questions since 1985. Indeed, while it may now be fairly said that the *Williamson County* decision is inconsistent with this Court's subsequent holdings in important respects, some lower courts continue to apply *Williamson County* as if subsequent decisions had not answered many of the open questions. Thus, the time has come for this Court to reexamine *Williamson County* in light of subsequent holdings of this Court, including *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), all of which have fleshed out the elements of a Fifth Amendment cause of action.

For example, at the time of the *Williamson County* decision, this Court had not yet determined whether a cause of action for a temporary taking (for economic injuries suffered prior to judicial invalidation of the ordinance) was cognizable. In fact, the majority of the *Williamson County* Court appears to assume that a state need not provide such a monetary remedy so long as it allowed a cause of action to invalidate the unconstitutional state action: "The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be canceled and must always give rise to a right to compensation." *Williamson County*, 473 U.S. at 203 (Stevens, J., concurring). Under this view, a requirement

that the plaintiff first litigate the validity of the ordinance or statute in state court before he could claim just compensation under the Fifth Amendment may appear logical and even prudent. Under this "California rule" (subsequently rejected in *First English*)[4], the plaintiff could litigate only the validity of the ordinance and had no right to demand that the state involuntarily condemn his property and pay money damages; likewise, temporary takings were not recognized and payment for such damages was not required. This view can no longer be sustained in light of *First English*.

First English also established the principle that temporary takings are compensable, an issue open at the time of the *Williamson County* decision. *First English*, 482 U.S. at 319. Moreover, the *First English* Court specifically found that the cause of action arose at the time the ordinance was passed and that compensation was due for the period between that passage and the date on which the offending ordinance was invalidated or repealed: "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compen-

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[4] As Justice Stevens said in his dissent in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), highlighting the conflict between *First English* and *Williamson County*:

> In short, even if the California courts adhere to a rule of never granting monetary relief for a temporary regulatory taking, I believe we should require the property owner to exhaust his state remedies before confronting the question whether the net result of the state proceedings has amounted to a temporary taking of property without just compensation. In this case, the Church should be required to pursue an action demanding invalidation of the ordinance prior to seeking this Court's review of California's procedures.

First English, 482 U.S. at 338 (Stevens, J., dissenting).

sation." *Id.* at 318. *First English* thus made clear that the plaintiff had a case for compensation under the Fifth Amendment at the time the ordinance was passed, in addition to the state court remedy for invalidation cited in *Williamson County* as the reason for requiring suit in state court (the second prong of the ripeness requirement). *See also Lucas v. South Carolina Coastal Council,* 505 U.S. __112 S. Ct. at 2901 ("When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

Similarly, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court found that a cause of action under the Fifth Amendment's Takings Clause arises at the time a permit condition becomes final where there is no nexus between the condition and the stated governmental purpose.[5] This Court clarified the rule this past term, in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), by requiring that the burden imposed be roughly proportional to the public burdens created by the proposed use of the property. In none of these cases did this Court suggest that the Fifth Amendment cause of action did not arise until after the plaintiff had litigated his claims under state law in order to demonstrate that he had, in fact, suffered injury.

As this Court has held on numerous occasions, the obligation for just compensation attaches whenever government action works a taking of private property rights. *Armstrong v. United States,* 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he is entitled. *First English* , 482

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[5] It should be noted that although not raised as a legal issue, no such nexus was present in this case.

U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

In short, subsequent decisions of this Court have determined that the Fifth Amendment cause of action arises at the time the administrative decision becomes final as a matter of fact. Nothing in those decisions suggests that the cause of action is incomplete until after the plaintiff had litigated his case in state court, nor do they stand for the proposition that a plaintiff whose state court case is removed to federal court is thereby defeated because the federal court lacks jurisdiction. Although *Williamson County* may have been a good guess at what was to come in Fifth Amendment jurisprudence in 1985, subsequent decisions of this Court require that *Williamson County* be revisited in light of current Fifth Amendment jurisprudence. Accordingly, Petitioners urge this Court to grant this Petition for review and declare that their case — which was removed by the Respondent to the federal court for resolution and which has now been tried twice — has satisfied the prudential concerns of the state exhaustion ripeness requirement set forth by this Court in *Williamson County*, or, alternatively, to reverse summarily the opinion below as inconsistent with this Court's subsequent holdings in *First English* and *Lucas*.

FACTUAL BACKGROUND

Petitioners, Richard and Ann Reahard, own approximately forty acres of land located in Lee County, Florida. From the advent of zoning in 1962, until December 1984, the property was zoned for a single family home subdivision with an allowable density of up to 126 homes. All of the land surrounding Petitioners' property had already been developed into single family residences.

In December 1984, Lee County re-zoned the forty acres as a "resource protection area," limiting development on the

property to only one house and designating the remainder of the land as "recreational, open-space or conservation" use. The Reahards' property is the only land in Lee County so designated.

Between 1984 and 1989, the Reahards exhausted every available option for obtaining administrative relief from this draconian classification, finally filing suit as a last resort. Now, after ten years — during which they obtained two favorable judgments in federal district court — the Reahards face having to go back to square one and start all over again in state court.

PROCEEDINGS BELOW

Prior to filing this suit, the Reahards pursued all available administrative remedies. The Reahards filed an Application for an Administrative Determination of Error, a Request for Plan Amendment, and an Application for Determination of Minimum Use. During the administrative process, the Reahards filed a site development plan aiming to develop thirty-five of the forty acres contained in the parcel. The Lee County Commission rejected the Reahard application, despite the positive recommendation of the County Planning and Zoning Commission. The Reahards also sought an administrative interpretation of their development rights pursuant to the Lee Plan, which requires that "interpretations which would be confiscatory, arbitrary, capricious, unreasonable, or which would deny all economically viable use of property shall be avoided. Lee Plan, Admin. Interp. Chapter XIV-6B(1). In July 1990, the Lee County Attorney's Office determined that the Reahards could construct four homes on the lot. The Reahards appealed, but the Board of Commissioners upheld the administrative determination, but modified it to allow only one home on the lot.

On September 1, 1989, the Reahards filed a complaint in

the Twentieth Judicial Circuit Court of the State of Florida, alleging that application of the Lee County Comprehensive Land Use Plan constituted a taking of his property under the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and requested just compensation for the taking. Petitioners conceded that the Lee Plan was a valid exercise of the police power of Lee County. On October 4, 1989, Lee County responded by removing the case from state court to United States District Court for the Middle District of Florida.

The case was heard by a magistrate judge, and issues of damages and liability were bifurcated. On January 16, 1991, the judge found that the claim was not barred by the statute of limitations, that the Reahards had exhausted all of the administrative remedies and that the claim was ripe for adjudication. The magistrate judge found that Lee County took the Reahards' land when it passed the Lee Plan because the plan deprived the Reahards of substantially all of the value of their property.

Lee County appealed this decision to the United States Court of Appeals for the Eleventh Circuit; the Eleventh Circuit dismissed the appeal because there had been no decision on damages yet. The jury trial on damages ended with a verdict for the Reahards on May 21, 1991 for $700,000 and 6.07% interest accrued from December 21, 1984. This sum represented a determination that the Lee Plan caused a ninety-six percent reduction in value in the Reahards' property. Appellee's Brief to the United States Court of Appeals for the Eleventh Circuit, at 3. The final judgment, issued June 6, 1991, was amended to award interest at twelve percent, and require the Reahards to execute and deliver a fee simple deed to Lee County.

Lee County again appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit issued an order that it would wait for the Supreme Court

opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992). In its decision, the Eleventh Circuit noted that the question presented in *Reahard v. Lee County* was not answered in *Lucas*. *See Reahard v. Lee County*, 968 F.2d 1131, 1134, n.5 (11th Cir. 1992), reproduced at Appendix D, *infra* ("Although we awaited the release of *Lucas*, the Court left open how the categorical takings rule set forth in its opinion applies to situations in which a part of a landowner's property is rendered unusable by a regulation."). On the second appeal, the Eleventh Circuit Court of Appeals remanded, suggesting that there may be ample evidence to support the decision but finding that the order misapplied the law on partial takings and failed to make adequate factual findings on which to base a decision. The remand occurred on August 14, 1992. On December 8, 1991, the Court of Appeals *sua sponte* issued an addendum opinion requesting the magistrate judge to consider the ripeness issue again to ensure that the court had jurisdiction. *Reahard v. Lee County*, 978 F.2d 1212 (11th Cir. 1992), reproduced at Appendix C, *infra*.

Pursuant to the direction of the appellate court, the trial court carefully reviewd the evidence and made detailed factual findings that were applied to the standards XX in the remand decision. The magistrate judge found that the case was ripe because the Reahards had exhausted all administrative remedies and because no state remedy existed at the time the Reahards filed suit and reinstated the jury verdict of $700,000. The court cited *Lee County v. Morales*, 557 So.2d 652, 656 (Fla. Dist. Ct. App. 1990) which held that no inverse condemnation remedy existed for a landowner aggrieved by zoning changes. Again, Lee County appealed to the United States Court of Appeals for the Eleventh Circuit, which held that the case was not ripe for review, and that the trial court had no subject matter jurisdiction over the claim. Therefore, the Eleventh Circuit reversed the district court

decision and remanded the cause to the state court from which it was removed by the defendant in 1989.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT — WHETHER THE TAKINGS CLAUSE INCLUDES THE ABSOLUTE REQUIREMENT THAT THE PLAINTIFF IN AN ACTION FOR JUST COMPENSATION FIRST FILE SUIT IN STATE COURT EVEN WHERE IT IS CLEAR THAT THE HAD NO REMEDY UNDER STATE LAW?

In *Williamson County*, this Court decided that a claim brought to invalidate a local zoning decision brought under 42 U.S.C. § 1983 was not "ripe" for federal court review because (1) the property owner had not obtained a "final decision" from the administrative agency and (2) the property owner had not first filed in state court to challenge the denial of the permit. *Williamson County,* 473 U.S. at 186. The policy underlying this Court's opinion was that federal courts should not intervene in reviewing a local zoning decision "until a final decision is made as to how the regulations will be applied to respondent's property." *Id.* at 200. Accordingly, this Court held that the case was not ripe for review because "we held that we could not review a taking claim as long as the property owner had an opportunity to obtain a variance or some other form of relief from the zoning authorities that would permit the development of the property to go forward." *First English,* 482 U.S. at 333 (Stevens, J., dissenting). Additionally, this Court was concerned about "evaluat[ing] [a] taking claim when the long term economic effects were uncertain because it was not clear that restrictions would remain in effect permanently." *Id.* at 331, *citing*

Williamson County, 473 U.S. at 190-91.

The court below has extended the holding of *Williamson County* to bar absolutely Petitioners from prosecuting a Fifth Amendment claim for just compensation unless the state claims have first been litigated in state court:

> As we have noted above, the Lee County Board of Commissioners decision issued on September 19, 1990 fulfilled the "final decision" requirement of *Williamson*. Several months earlier, however, the Florida Supreme Court recognized an inverse condemnation remedy. Thus, by the time that the "final decision" obstacle was removed from the path of the Reahards' federal claim, a second obstacle to that claim had been erected in the form of a newly-recognized state remedy for inverse condemnation. The Reahards' claim therefore never has become ripe while on the federal court docket; until they have pursued their state remedy, the federal courts are without subject matter jurisdiction.

Reahard v. Lee County, 30 F.3d at 1417-18 (citations omitted), reproduced at Appendix A, *infra*.

Yet this Court has never held, much less suggested, that the Takings Clause includes a requirement that a claim for just compensation, which satisfies Article III "case or controversy" and causes injury-in-fact, is to be dismissed from federal court as "unripe" — after having been tried twice and reviewed by the court below twice — simply because the plaintiff was prevented from filing a futile lawsuit in state court.

A. THE LOWER COURT'S DECISION CONFLICTS WITH PRECEDENT SET BY THIS COURT IN *FIRST*

ENGLISH AND *LUCAS*, AND OTHER DECISIONS OF THIS COURT REGARDING RIPENESS.

The *Williamson County* Court stated that the second prong of its ripeness requirement was based on the Takings Clause itself: "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 195, n.13.

Yet, when *Williamson County* was decided in 1985, there were many open issues in takings law. Chief among these were the questions (1) whether a temporary taking was compensable under the Fifth Amendment and (2) whether invalidation was the only remedy for a regulatory taking. Thus, the requirement that a plaintiff first litigate his case in state court before filing it in federal court reflected, in part, these uncertainties in the law. In 1987, however, this Court answered both of these questions making clear that the plaintiff had a case for just compensation under the Fifth Amendment at the time the ordinance was passed in addition to the state court remedy for invalidation. *First English*, 482 U.S. 304 (1987).

Moreover, the decision below, which would bar the door of the federal courthouse for plaintiffs seeking compensation under the Fifth and Fourteenth Amendments, is based on a draconian theory of ripeness not countenanced in any other area of law. In the landmark case of *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), this Court explained that the purpose of the ripeness doctrine

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in

a concrete way by the challenging parties.

Id. at 148-49.

The *Abbott Labs* Court added: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Thus, the ripeness doctrine has not generally been treated by this Court as a jurisdictional or strict procedural and mechanistic requirement mandating the trial and retrial of issues in multiple courts as a prelude to vindicating constitutionally-protected rights. Professor Marla E. Mansfield states, quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring):

> Justice Frankfurter's concurrence is telling. Despite his many opinions closing the courthouse door, he emphasized that '[f]inality is not . . . a principle inflexibly applied.' Crucial elements to consider include the probability that the plaintiff will be impacted and the burden created by procedures that exist for challenging the ultimate action.

Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. Rev. 1, 21-22 (1992).

The *Abbott Labs* ripeness doctrine is reflected in the recent decision of *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992). In *Lucas*, this Court explained why it rejected the *Williamson County* argument pressed by government counsel that the case be remanded to state court for another hearing to determine if the court below would alter its ruling in light of the recent amendments to the

Beachfront Management Act. Those amendments specifically set up a variance process that would, if applied to the petitioner in that action, require him to start all over again by submitting a variance to the state. This Court rejected that argument, however, and concluded that the case as it was then presented to the Court was ripe for review and that "neither 'prudence' nor any other principle of judicial restraint requires that we remand . . ." *Id.* at 2892, n.5.

Thus, contrary to this Court's treatment of ripeness in *Lucas*, which is consistent with this Court's other rulings on ripeness, the decision below sets a dangerous and far-reaching precedent that sanctions the whipsawing of Fifth Amendment plaintiffs from court to court, requiring that both public and private resources be wasted on futile and pointless litigation in order to "ripen" the case for federal court review. This turns the whole purpose behind the ripeness doctrine on its head. *See, e.g., Taylor Inv., Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1289-90 (3d Cir.), *cert. denied*, 114 S. Ct. 304 (1993) (recognized that the ripeness doctrine is grounded in both prudential considerations and the case or controversy requirement). *See also Eide v. Sarasota County,* 908 F.2d 716, 720-24 (11th Cir. 1991).

That the ripeness standard sanctioned by the court below disregards the prudential concerns of the ripeness doctrine, and instead leads to gamesmanship and protracted litigation has not escaped the notice of other federal judges. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398 (9th Cir. 1989), the Ninth Circuit Court of Appeals dismissed a lawsuit from federal court as unripe under *Williamson County* after six years of litigation because the property owner had not first prosecuted his case in state court. Expressing dismay over the use of *Williamson County* as a delay tactic by the governmental defendant, Judge Alex Kozinski, writing for the *Sinaloa* court, observed: "Plaintiffs filed this lawsuit in December 1983, yet it was not until May 1986, one month

before trial was to begin, that defendants first raised a ripeness challenge. It is clear they knew from the beginning that plaintiffs had not exhausted their state compensation remedies." *Id.* at 1403, n.3. The court there concluded that an appropriate solution to avoid any further delay resulted from the need to comply with *Williamson County* was to allow the plaintiff to amend its federal complaint on remand to include a pendent state law takings claim. The federal district judge could then ascertain whether the state would afford the plaintiff just compensation as a pendant state claim. *Id.* at 1404, n.4.

Other federal judges have allowed plaintiffs to plead their claims as something other than a takings claim so as to avoid the technical trap which *Williamson County* has now become. For example, a federal judge in Colorado recently refused to dismiss a lawsuit, concluding that the second prong of *Williamson County* did not bar property owners from going forward with their claim for money damages because the plaintiffs had alleged a "conspiracy" to take their property, not the actual "taking" of their property. *Oberndorf v. City of Denver,* 653 F. Supp. 304 (D. Colo. 1986). The judge noted that "if plaintiffs seek just compensation through inverse condemnation proceedings, then the objective, which defendants' conspiracy was designed to achieve, would be realized." *Id.* at 308. The *Oberndorf* court continued:

> This last point is key. If plaintiffs now execute their state court remedy, as defendants suggest, then they would be playing right into the scheme defendants have allegedly constructed. There are no further steps available to plaintiffs which might relieve them of the burdens created by the Urban Renewal Plan.

Id.

Likewise, requiring Petitioners to start all over again by forcing them to file their lawsuit in state court plays right into the governmental defendant's gamesmanship. The Petitioners did originally file their lawsuit in the Twentieth Judicial Circuit Court of Florida in September of 1989. After that, the Respondent voluntarily and intentionally removed the case from state to federal court, asserting that a federal question existed — *i.e.*, whether a Fifth Amendment taking requiring just compensation had occurred. It was not until after the case had been tried twice and appealed twice that the governmental defendants asserted that the case should have been tried first in state court.

The court below has never explained why the Petitioners' initial filing of their lawsuit in state court did not satisfy the second prong of *Williamson County*. By holding the case as not ripe at this time, the court below not only encourages further gamesmanship by governmental defendants in other cases but eradicates the results of two trials on the merits in this case[6] (one before a jury) and two appeals, spanning five years of litigation. Now, ten years after passage of the ordinance in question, Petitioners face the prospect of beginning the process all over again by attempting to file in state court a second time (facing the additional hurdles imposed by the statutes of limitations and the passage of time).

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[6] The trial court found that the Reahards had exhausted their administrative remedies and that the Lee Plan had destroyed their investment-backed expectations to such an extent as to constitute a taking.

B. THIS IS AN ISSUE OF CRITICAL IMPORTANCE TO FIFTH AMENDMENT PLAINTIFFS BECAUSE A RIGID APPLICATION OF *WILLIAMSON COUNTY* NOW BARS COUNTLESS PROPERTY OWNERS FROM VINDICATING THEIR CONSTITUTIONAL RIGHTS TO JUST COMPENSATION IN FEDERAL COURT.

An even more perverse result occurs when the *Williamson County* ripeness doctrine combines with *res judicata* principles, barring a plaintiff from "relitigating" the takings claim which he filed in state court in obedience to the second ripeness hurdle. Under this "catch-22", a plaintiff *must* first file in state court (*Williamson County*) and, having litigated his claim to judgment, will be dismissed from federal court precisely *because* he did so. Thus, a plaintiff may be barred from bringing his constitutional claim to federal court — either because he has not yet litigated it in state court first, or because he has done so. *See generally* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, *in* Institute on Planning, Zoning, and Eminent Domain § 7 (Matthew Bender 1991) and Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990). For example, in *Palomar Mobilehome Park Ass'n v. City of San Marcos,* 989 F.2d 362 (9th Cir. 1993), a property owner filed suit in state court to challenge a mobile home rent control ordinance as an unconstitutional taking. He lost. The plaintiffs then filed in federal court, where the case was dismissed on the grounds of *res judicata:*

> Palomar's first argument, that its takings claim cannot be barred because it was not ripe until the state court ruled on its claim, lacks merit. Palomar correctly interprets *Williamson County*, to require that

> a plaintiff take its takings claim to state court before the case will be ripe for federal adjudication. However, this requirement does not prevent the doctrine of *res judicata* from barring subsequent federal action. . . . "Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitles them to no more." . . . We are compelled to conclude that *res judicata* bars Palomar's claims in federal court, despite the requirements of *Williamson*.

Id. at 364-65 (citations omitted), *quoting Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) (subsequent federal claim for just compensation was also barred by the doctrine of *res judicata*). *Accord Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) the neighbors of the Tampa Airport sought compensation in state court for the taking of noise and avigation easements over their properties. They restricted their state lawsuit to Florida law, and raised no claims under the federal constitution. Having lost their suit at the state level, they filed their lawsuit in federal court, raising their federal claims. The case was dismissed as being barred by *res judicata* and collateral estoppel. The *Fields* court correctly framed the issue which must be resolved by this Court:

> This case presents a jurisdictional problem created by the interplay between 28 U.S.C.A. § 1738 and the Supreme Court's holding in *Williamson County*. On the one hand, *Williamson County* requires po-

> tential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize *res judicata* and collateral estoppel doctrines that would require a state court litigant to raise his federal law claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding.

Id. at 1302-03 (citations omitted). *Cf. New Port Largo, Inc., v. Monroe County,* 985 F.2d 1488 (11th Cir. 1993) (case was not time-barred because it was premature to file in federal court until state litigation was complete).

Thus, a broad application of the second prong of the *Williamson County* ripeness requirement is not only a time-wasting hurdle for the courts and litigants, but may, in fact, bar altogether federal court adjudication of their Fifth Amendment claim for just compensation. While *Williamson County* may have been originally intended to require the litigation of state issues in state court, leaving the federal forum available in those instances where the state failed to provide compensation for a violation of the takings clause, the ripeness requirement was never intended to bar altogether Fifth Amendment litigants from federal court. Indeed, it would be anomalous to suggest that a right guaranteed by the United States Constitution could not be litigated in federal court. *See Jacobs v. United States*, 290 U.S. 13 (1933) (inverse condemnation suit rests on the Fifth Amendment and

is therefore based on the Constitution).

In order to avoid such a result, some circuits have interpreted *Williamson County* narrowly, holding that it only applies in claims for just compensation. *See, e.g., Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) (aggrieved landowner asserted deprivation of procedural due process so his action was ripe even though he did not exhaust administrative remedies).

C. THERE IS A SERIOUS SPLIT AMONG THE CIRCUITS AS TO WHETHER *WILLIAMSON COUNTY* BARS FEDERAL COURT ACCESS FOR A CASE BROUGHT DIRECTLY UNDER THE FIFTH AMENDMENT.

Petitioners brought their claim for just compensation directly under the Fifth and Fourteenth Amendments to the United States Constitution. Because Petitioners have a claim under the Constitution, they need not look to any statute — such as 42 U.S.C. § 1983 — to state a claim for relief in federal court.[7] Federal courts have subject matter jurisdiction

[7] The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity establishes that the Amendment itself is only a limitation on the power of the government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Brief for United States as Amicus Curiae 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. *See San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655, n.21 (1981) (Brennan, J., dissenting), *quoting United States v. Dickinson*, 331 U.S. 745, 748 (1947).
First English, 315 U.S. at 316, n.9.

for actions brought directly under the Fifth and Fourteenth Amendments pursuant to 28 U.S.C. § 1331. The court below's conclusion that it lacked "subject matter" jurisidiction over the Petitioners' claim is extraordinary, particularly since this Court so recently that a cause of action for a violation of the Fifth Amendment arises at the time the governmental act destroys or infringes upon private property rights. *First English,* 315 U.S. at 320, n.10.

Unlike the Petitioners' action which is founded on the Fifth Amendment, the claim barred as unripe for federal court review in *Williamson County* was a takings claim brought pursuant to Section 1983. The *Williamson County* Court held that the *Parratt* doctrine — an exception to the normal rule that plaintiffs need not exhaust administrative remedies before bringing a Section 1983 action — barred the Petitioners' claim for just compensation because the state had not yet fully determined that compensation would not be paid to the property owner. *Williamson County*, 437 U.S. at 195. *See Parratt v. Taylor*, 451 U.S. 527 (1981) (plaintiff's Section 1983 action deemed not ripe because the state provided a post-deprivation process for the alleged denial of due process).

Prior to *Williamson County,* lower courts followed this Court's rule in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which held that there is no requirement that a plaintiff exhaust administrative remedies before bringing a Section 1983 action. Since *Williamson County* was decided, lower courts have been split as to whether *Williamson County* applies only to takings cases brought under Section 1983, whether it applies broadly to takings claims brought directly under the Fifth Amendment, and even whether *Williamson County* applies to claims beyond the Fifth Amendment. The court below applied *Williamson County* broadly, to bar the Reahards' Fifth Amendment takings claim. *Compare Nasierowski Bros.*, 949 F.2d at 894 ("a procedural due pro-

cess claim is instantly cognizable in federal court ") *with Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994) (applying *Williamson County* to non-taking claim involving zoning).

The better interpretation of *Williamson County* is reflected in the Sixth Circuit's recent decision in *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), in which the court held the filing of an equal protection action (challenging a zoning action) in federal court was ripe because:

> We believe that finality, not the requirement of exhaustion of remedies, is the appropriate determinant of when litigation may begin. By finality we mean that the actions of the city were such that further administrative action by Bannum would not be productive. This test, of course, can be met by the exhaustion of remedies. It can also be met by other evidence and can be satisfied prior to compliance with all the required procedures. This analysis suggests that *Williamson* does not require a finding of lack of finality in this case.

Id. at 1362-63.

Just last term this Court made plain that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should [not] be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard,* 114 S. Ct. 2309, 1994 U.S. LEXIS 4826, *31 (1994). This Court has also made clear that the protection of private property is essential to maintaining all other civil rights protected by the Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Yet lower courts cannot provide the vigorous protection to private property rights envisioned by the founding fathers if their ability to hear takings claims is precluded by a rigid jurisdictional standard.

Indeed, the ripeness standard applied by some lower courts in Fifth Amendment cases is unlike that faced by plaintiffs in any other area of constitutional law. *See, e.g., Kelly v. Nordberg*, 1993 U.S. App. LEXIS 20719 (1st. Cir. Aug. 17, 1993) (upholding right of plaintiff to file action alleging unconstitutional infringement of right to travel directly in federal court). The ripeness standard adopted by the court below would not survive constitutional scrutiny were it applied to bar federal court review of an equal protection, First Amendment or other constitutional cause of action. Fifth Amendment plaintiffs are a notable exception to the general rule that exhaustion of state remedies is not necessary before federal courts can hear a case.[8] *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (challenge to Pennsylvania abortion statute on due process grounds ripe when first brought in federal court); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (challenge to zoning ordinance restricting adult businesses on First Amendment grounds ripe when brought first in federal court); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) (commerce clause challenge to Connecticut statute requiring out of state beer shippers to affirm that products sold to Connecticut dealers be priced no higher than in neighboring states considered ripe when first brought in federal court); *Kentucky Dep't of Corrections v. Thompson*,

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[8] In cases involving a writ of habeas corpus, prisoners are required to exhaust their state remedies before they can bring suit in federal court, in large part because this is required by the habeas corpus statute. 28 U.S.C. § 2254. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), state prisoners sued in federal court under both § 1983 and the habeas corpus statute because their good-time credits were cancelled after disciplinary problems. The Court held that their case was not ripe, even though there was no state exhaustion requirement in § 1983, noting considerations of federal-state comity, respect for state functions, and the habeas corpus exhaustion requirement.

490 U.S. 454 (1989) (suspension of visitation rights for inmates in Kentucky prisons without hearing challenged on Fourteenth Amendment Due Process grounds, and ripe when first brought in federal court); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (challenge to airport restriction on handing out literature on First Amendment grounds ripe when brought first in federal court); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (challenge to city zoning ordinance requiring special use permit for group home for mentally retarded on Equal Protection grounds ripe when first brought in federal court). Indeed, even in actions brought under Section 1983, courts have not uniformly required plaintiffs to exhaust their state court remedies when constitutional rights — other than Fifth Amendment rights — are at stake.

For example, in *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), plaintiffs who challenged a state statute that provided for dismissal or suspension of teachers who engaged in public homosexual conduct on the ground that it violated the Fourteenth Amendment were allowed to file their action directly in federal court. They were not required to file first in state court to ascertain whether the state would afford them a remedy. *See also Barry v. Barachi*, 443 U.S. 55 (1979). In *Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway Co.*, 273 U.S. 625 (1927), plaintiffs brought an action under the Fourteenth Amendment alleging that the passenger rates set by the defendant were confiscatory. This Court held that requiring plaintiffs to exhaust state remedies is not a "fundamental principle of substantive law but [is] merely a requirement of convenience or comity." *Id.* at 628. As the *Duluth Street Railway* Court further explained:

> Where as here a constitutional law right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired

> result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if afterwards went to the District Court of the United States.

Id.

In *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975), the court held that "[t]he exhaustion doctrine is not inflexible and when the reasons supporting the doctrine are found inapplicable, the doctrine should not be blindly applied." *Id.* at 474. Accordingly, the court held that the plaintiff could pursue his Fourth Amendment cause of action in federal court without exhausting his military court remedies.

Nor has this Court rigidly required state court exhaustion under the First Amendment. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), a group of professors attacked a state university requirement that they sign a statement that they were not communists. Failure to sign the statement would lead to dismissal. The plaintiffs would not sign the statement, and sued directly in federal court. There was no mention of the issue of state exhaustion. *See also Lasco v. Koch*, 428 F. Supp. 468 (S.D. Ill. 1977) (state civil service employee brought a Section 1983 action in federal court on the grounds that he had been unlawfully discharged for exercising his First Amendment rights not required to exhaust state remedies).

Finally, this Court has also rejected the notion that a plaintiff must always first file in state court before seeking relief in federal court for an alleged violation of the Fifteenth Amendment. *Lane v. Wilson*, 307 U.S. 268 (1939). In *Lane*, the plaintiff had sued for damages resulting from discriminatory treatment arising out of voter registration requirements intended to prevent blacks from voting. The state argued that

the plaintiff must first use established state procedures for determining claims of discrimination. This Court, however, rejected that argument stating: "Barring only exceptional circumstances, or explicit statutory requirements, resort to a federal court may be had without first exhausting the judicial remedies of state courts." *Id.* at 274 (citations omitted).

CONCLUSION

In order for lower courts to ensure that the Fifth Amendment claims for just compensation are vindicated, it is critical that the issue of whether ripeness is an absolute jurisdictional bar, or is instead a doctrine with prudential considerations to be resolved by this Court. Otherwise, and without this Court's intervention, the Fifth Amendment will remain the "poor relation" of other constitutional rights.

Accorcdingly, the Petitioners hereby urge this Court to grant this Petition for Writ of Certiorari to review the decision of the court below, or alternatively, to reverse summarily the decision below.

Respectfully submitted,

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February 16, 1995

APPENDIX A

Richard Reahard; Ann P. Reahard, Plaintiffs-Appellees, v. Lee County, Defendant-Appellant.

REAHARD v. LEE COUNTY

No. 93-2743.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

30 F.3d 1412; 1994 U.S. App. LEXIS 23881;
8 Fla. Law W. Fed.
C 573

September 2, 1994, Decided

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida. (No. 89-227-Civ-FTM-10C). George T. Swartz, Magistrate.

DISPOSITION: Reversed and Remanded.

COUNSEL: For Defendant-Appellant: JOHN JOSEPH RENNER, Lee County Attorney's Office, Meyers, FL. For Defendant-Appellant: BRUCE R. CONROY, City Attorney's Office, Cape Coral, FL. ROBERT N. REYNOLDS, Winter Park, Florida.

For Plaintiff-Appellee: THEODORE L. TRIPP, JR., Garvin

& Tripp, Ft. Myers, Florida. For FL Dairy Farmers, etc, Plaintiffs-Appellees: MARTY SMITH, Simmons & Hart, Ocala, FL. For Southeastern Legal Foundation, Plaintiffs-Appellees: G. STEPHEN PARKER, Atlanta, GA. For Plaintiffs-Appellees: Robert M. Rhodes, STEEL HECTOR & DAVIS, Tallahassee, FL.

For Nat'l Assoc. of Home Blders, Amicus: WILLIAM H. ETHIER, Cohn & Birnhaum, Hartford, CT. ROBIN L. RIVETT, Sacramento, CA. For 1000 Friends of Florida, Amicus: RICHARD GROSSO, Tallahassee, Florida. For FL DEPT OF COMM. AFFAIRS, Amicus: DAVID J. RUSS, Asst. General Counsel, Tallahassee, Florida.

JUDGES: Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and CLARK, Senior
Circuit Judge.

OPINIONBY: KRAVITCH

OPINION: [*1413] KRAVITCH, Circuit Judge:

At issue in this case is the constitutionality of the developmental regulations placed on an approximately 40 acre tract of waterfront land in Lee County, Florida. Because we hold that the federal courts lack jurisdiction on ripeness grounds, we REVERSE the judgment of the district court, and REMAND this case to the district court with instructions to remand the cause to the state court from which it was removed.

I.

In 1944, appellee Richard Reahard's parents purchased a 540 acre tract of land in Lee County, Florida. Over the next

three decades, his parents made use and profit from the 540 acre tract, subdividing, filling, developing and selling many single lots. By 1975, they retained only a 40 acre tract of undeveloped wetlands, which is the subject of this action.

Upon the death of Richard Reahard's mother on November 30, 1984, he inherited the 40 acre site and sought to develop it as either a 41 or 126 unit lot subdivision for [**2] single-family residences. This plan was thwarted when the Lee County Board of Commissioners passed the Lee County Comprehensive Land Use Plan ("Lee Plan") on November 16, 1984. The Lee Plan took effect in December 1984.

The Lee Plan classified the Reahards' n1 property as a Resource Protection Area ("RPA"), limiting development either to a single residence, or for use of a "recreational, open space or conservation nature." n2 The Reahards opposed this classification by pursuing several available administrative procedures. On January 27, 1988 they sought an amendment to the Lee Plan which would have upzoned the property. The Lee County Board of Commissioners denied this request. The Reahards then sought an "administrative interpretation" of their development rights, pursuant to Section XIV of the Lee Plan. That section requires, *inter alia*, that "interpretations [of the Lee Plan] which would be confiscatory, arbitrary, capricious, [*1414] unreasonable, or which would deny all economically viable use of property shall be avoided." Lee Plan, Admin.Interp. Chapter XIV-6B(1). It also provides an exception to the Lee Plan where "vested rights" exist, and sets forth standards for determining [**3] when an applicant may claim this exception. Id., Chapter XIV-7(6).

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n1 Richard Reahard's wife, Ann P. Reahard, was added as a party after this action was filed.

n2 Under the Lee Plan, RPA wetlands are considered "areas

in which it is necessary to protect, conserve, restore or preserve water resource systems and the biological functions attendant thereto." Lee Plan, Policy 1.5.1, p. II-7. Deemed "unsuitable for all but extremely low density development," their preservation prevents degradation of natural resources, including water quality, freshwater storage capabilities, biological productivity, and viability of plants and animals. *Id.* Their preservation also prevents flooding. Id. Lee County has prohibited the construction of ditches, canals, dikes, roads above grade, and additional drainage on RPA wetlands. *Id.* at II-7-8. Maximum density on RPA sites is one dwelling unit per forty acres. Id. at II-8. It is undisputed that the site in this case is a pristine wetland, and is inundated with water during high fall and spring tides, and during any powerful storm.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

[**4]

In July 1990, the Lee County Attorney's Office, the administrative designee under the Lee Plan, ruled that the Reahards were entitled to construct four single-family residences on the parcel. The Reahards appealed this determination to the Board of County Commissioners, on the ground that it was based on mistakes in deeding and land boundaries. On September 19, 1990, the Board issued a final decision, upholding the administrative determination rejecting the Reahards' proposal, but "modif[ying it] to reflect approval for one single family residence on the 35 acre parcel."

Over one year previous to the Board's decision, on September 1, 1989, the Reahards had filed the instant complaint in Florida state court. They alleged that although the classification of their land as an RPA was a valid exercise of the County's police power, it constituted a taking under state and federal law entitling them to just compensation. n3 On October 5, 1989, Lee County removed to federal court. n4

----------Footnotes----------

n3 Specifically, the Reahards invoked sections 163.3194(4)(b) and 380.08 of the Florida Statutes, Article X, Section 6 of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. [**5]

n4 For a complete description of this case's prior procedural history and the evidence presented below, see *Reahard v. Lee County*, 968 F.2d 1131, 1133-34 (11th Cir.1992).

----------End Footnotes----------

The case was heard before a magistrate judge, pursuant to 28 U.S.C. @ 636(c)(1), n5 and was limited to the issue of whether a taking had occurred. The magistrate judge held that a taking had occurred because but for the Lee Plan "some of the property" could have been developed and, moreover, because the Lee Plan had caused a "substantial deprivation of the value" of the parcel. The magistrate judge further held that the Reahards had exhausted their administrative state remedies. A jury awarded them $ 700,000.00, plus interest accrued, as just compensation.

----------Footnotes----------

n5 Parties may consent to have a United States magistrate judge "conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. @ 636(c)(1).

----------End Footnotes----------

[**6]

Lee County appealed directly to this court, pursuant to 28 U.S.C. @ 636(c)(3). n6 We reversed the magistrate judge's order, *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir.1992), and held that the magistrate judge had misapplied the test for regulatory takings. Subsequently, we issued an addendum opinion instructing the magistrate judge to address the question of ripeness and determine whether the district court had jurisdiction over this matter. *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir.1992). As to jurisdiction, we noted not only that there was a "question regarding the Reahards' efforts to secure appropriate administrative remedies," but also that there was "nothing in the record regarding the judicial remedies available in Florida state courts." Id. Specifically, we recognized that "assuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), [**7] and there is no subject matter jurisdiction." *Id.*

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n6 Title 28 U.S.C. @ 636(c)(3) provides that "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court."

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On remand, the magistrate judge held that all state remedies had been exhausted because no remedy existed under Florida law, and that no further administrative remedies existed. Again holding that a taking had occurred, the magistrate judge reinstated the jury verdict of $ 700,000.00. We

now revisit our prior rulings, and hold that based on the analysis required by *Williamson*, this matter is not ripe for review and the federal courts therefore lack subject matter jurisdiction.

[*1415] II.

The question of ripeness "goes to whether the district court had subject matter jurisdiction." *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir.1989). [**8] As a jurisdictional issue, it is reviewed by this court de novo. See generally *Tamiami Partners v. Miccosukee Tribe*, 999 F.2d 503, 507 (11th Cir.1993); *United States v. Perez*, 956 F.2d 1098, 1101 (11th Cir.1992); see also *Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1545 (9th Cir.1994) ("We review ripeness *de novo*.") (citation omitted).

Lee County argues that the Reahards' claim did not ripen until the County Board of Commissioners issued its September 19, 1990 decision denying permission to build anything but a single-family residence and affirming as modified the administrative determination. It contends that five months prior to that date, the Florida Supreme Court recognized a state compensation remedy for regulatory takings in *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla.1990). The County therefore argues that the federal courts have never had subject matter jurisdiction, and that until the Reahards pursue their state remedy this matter is not ripe for review. For the reasons that follow, we agree.

As we have noted previously, [**9] this is a just compensation action, in which the aggrieved landowners seek only monetary compensation for the value taken. See *Reahard*, 968 F.2d at 1135. n7 "In order for such a claim to be ripe for adjudication, the landowner must overcome two hurdles: the final decision hurdle and the just compensation hurdle." Id. at 1135 n. 7 (quoting *Eide v. Sarasota County*,

908 F.2d 716, 720-21 (11th Cir.1990), cert. denied, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991)). To satisfy the "final decision" hurdle, an aggrieved landowner must demonstrate that the decisionmaker "charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116. n8 In other words, a just compensation claim cannot ripen until the "local authority has determined the nature and extent of the development that will be permitted." *Eide*, 908 F.2d at 721. [**10]

----------Footnotes----------

n7 In a just compensation claim, as opposed to a due process takings claim, the aggrieved landowner "does not seek "an invalidation of the local authority's application of the regulation,' ... but simply monetary compensation for the value taken." *Reahard*, 968 F.2d at 1135 (quoting *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir.1990), cert. denied, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991)).

n8 In *Williamson*, 473 U.S. at 191, 105 S.Ct. at 3118-19, the Court held no "final decision" had been reached until the local planning commission "determined that no variances will be granted," because only then could a jury determine whether respondent would "be unable to derive economic benefit" from the land.

----------End Footnotes----------

In most cases, no "final decision" has been reached until an aggrieved landowner has applied for at least one variance [**11] to a contested zoning ordinance. See *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116 (claim not ripe where respon-

dent did not seek variances from Board of Zoning Appeals); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547 (11th Cir.1994) ("In most instances a property owner must apply for a variance for a less intrusive use, to determine what use the municipality will allow...."); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.) (aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans"), cert. denied, U.S. , 112 S.Ct. 55, 116 L.Ed.2d 32 (1991).

In the present case, the Reahards initially sought what was in effect a variance from the Lee Plan, by requesting that the Board's administrative designee issue an "administrative interpretation" regarding their proposed 127 unit development. n9 The administrative [*1416] designee—in this case, the Lee County Attorney—determined that the Reahards had the right to build four single [**12] residences on the parcel. The Reahards appealed this decision to the Lee County Board of Commissioners, which, acting pursuant to the appeals process set forth in the Lee Plan, affirmed as modified the administrative determination on September 19, 1990. The Board's rejection of the proposed development concluded the administrative review process set forth in the Lee Plan, and therefore represented a "final decision" on the Lee Plan's application to the property. See *Greenbriar*, 881 F.2d at 1575-76 (final decision reached when City Council and Planning and Zoning Commission had rejected property owner's proposals). n10 Until the Board's decision was issued, it had not been conclusively determined that the Reahards would not be permitted to exceed the single residence limitation on RPA land set forth in the Lee Plan. The Reahards' claim therefore could not have ripened, if ever, until September 19, 1990, the date of the Lee County Board of Commissioners' final decision. n11

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n9 Under the Lee Plan's administrative guidelines, zoning designations initially are challenged before the Plan's administrative designee—here, the Lee County Attorney's Office. That designee determines whether to affirm the classification or issue a variance. A variance from the Lee Plan designation may be issued according to the following guidelines:

(1) Interpretations [of the Lee Plan] which would be confiscatory, arbitrary, capricious, unreasonable, or which would deny all economically viable use of property shall be avoided;

....

(3) All interpretations should weigh the public benefits and burdens against the private benefits and burdens to be imposed.... If the effect of the interpretation would be to relieve or prevent a substantial public burden, greater weight should be given to the relief or prevention of that burden;
(4) Interpretations should be consistent with background data, other policies, and objectives of the Plan[.] Lee Plan, Admin.Interp. Chapter XIV pp. 6-8. The Lee Plan also recognizes a "vested rights" remedy, which exists where an applicant has relied in good faith and to his substantial detriment on an act or omission of Lee County. *Id.* Chapter XIV p. 7.

An aggrieved landowner may appeal the administrative designee's determination concerning these remedies to the full Board of County Commissioners, which then must issue a final decision within thirty days. *Id.* Chapter XIV p. 9. [**13]

n10 In some cases, an administrative decision might be sufficiently final without resort to any appeals process. See, e.g., *Weissman v. Fruchtman*, 700 F.Supp. 746, 755

(S.D.N.Y.1989) ("An administrative decision may be a sufficiently final action to satisfy the finality requirement without representing an exhaustion of all available administrative remedies."). But where, as here, the variance process explicitly provides for an "appeal" to the authoritative local decisionmaker—such as, in this case, the Board of Commissioners—the appeal must be fully pursued before any definitive "final" decision occurs. Compare, e.g., *Milne v. Township of Oregon*, 777 F.Supp. 536, 537-38 (E.D.Mich.1991) (appeal from denial of variance a prerequisite to claim of taking without just compensation) with *Patrick Media Group, Inc. v. City of Clearwater*, 836 F.Supp. 833, 836 (M.D.Fla.1993) (appeal from denial of variance unnecessary where ordinance did not provide for such appeal).

n11 The County does not contend that the Reahards' claim ripened on a date after the Board's September 19, 1990 decision rejecting appellees' proposed 127 unit subdivision. We therefore need not address whether the submission of further, more modest proposals might have been acceptable to the County and might therefore have been a further prerequisite to ripeness. Compare *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53, 91 L. Ed. 2d 285, 106 S. Ct. 2561 and n. 9, 106 S.Ct. 2561, 2567-68 and n. 9, 91 L.Ed.2d 285 (1986) (Planning Commission's initial rejection of proposed 159 residence subdivision, based on inadequacies in plan, did not render just compensation claim ripe; "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

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This conclusion does not end our ripeness inquiry. The Reahards' claim has ripened only if the "just compensation"

hurdle has been met, i.e. if "all state procedures for just compensation have been utilized." *Eide*, 908 F.2d at 723 (citing *Williamson*, 473 U.S. 185-86; 105 S.Ct. at 3116); see also *Executive 100*, 922 F.2d at 1542 ("If the government has provided an adequate process for the property owner to obtain compensation [such as inverse condemnation proceedings], and if resort to that process yields just compensation, then the owner has no just compensation claim.") (citing *Williamson*, 473 U.S. at 195). The rationale for this requirement is that "the State's action is not "complete' in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' *Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121 [**15] (quoting *Hudson v.Palmer*, 468 U.S. 517, 532 n. 12, 104 S.Ct. 3194, 3203 n. 12, 82 L.Ed.2d 393 (1984)). While "the finality requirement is concerned with whether the initial decisionmaker has actual, concrete injury[,] the exhaustion requirement [*1417] generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy." *Id.* at 193, 105 S.Ct. at 3120. Cf. *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1493 (11th Cir.) (regulatory takings claim ripens only after "state judicial authorities ... make a final determination on the status of the subject property") (Tjoflat, C.J., concurring specially) (citing *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)), cert. denied, U.S. , 114 S.Ct. 439, 126 L.Ed.2d 373 (1993). n12

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n12 Two special concurrences in *New Port Largo*, 985 F.2d 1488 (*per curiam*) indicate some tension between this circuit's precedent in *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir.1990) and *Williamson*, as to the accrual of a claim that property has been taken without just compen-

sation. Compare *New Port Largo*, 985 F.2d at 1497 (Tjoflat, C.J. concurring specially) ("under *Corn* [as opposed to *Williamson*] a federal takings claim ripens only after the property owner has exhausted all legal means of challenging the ordinance;" thus, "*Corn* erred by improperly expanding *Williamson*'s final decision requirement until "state review entities'—rather than the initial decisionmakers—"have made a final determination' ") with *New Port Largo*, 985 F.2d at 1499 (Edmondson, J., concurring specially) (*Corn* addressed statute of limitations accrual, but "did not decide (because it was unnecessary to decide) when *Corn*'s taking claim first became ripe ... for federal adjudication") (citing *Corn*, 904 F.2d at 588).

We are mindful of these concerns. Based on the circuit precedent cited herein, however, and also recognizing that *New Port Largo* and *Corn* involved accrual for purposes of the statute of limitations, not ripeness, we employ the two-pronged approach set forth in *Williamson*. The result is identical under either approach: until the Reahards pursues their remedy in Florida's courts, their claim is not yet ripe.

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[**16]

It follows that "as a practical matter, *Williamson* precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation." *New Port Largo*, 985 F.2d at 1496 (Tjoflat, C.J., concurring specially). The dispositive issue in this case therefore is whether the Reahards had at their disposal an available state remedy, such as an inverse condemnation action, at any time before the Board's final decision was issued in September 1990. If they did not, then this case became ripe on September 19, 1990, upon the final decision by the Board of Commissioners. But if they did, then this case has not yet ripened

for purposes of federal review.

Before April 1990, it was not clear whether Florida's courts recognized an inverse condemnation remedy based on zoning classifications. In *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla.1990), which was decided in April 1990 and involved a state-imposed development moratorium, the Florida Supreme Court for the first time explicitly recognized such [**17] a cause of action. See *Id.* at 624 ("The state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property."); *Executive 100*, 922 F.2d at 1542 ("The Florida courts have recognized that ... property owners have the right to bring reverse condemnation proceedings seeking compensation for regulatory takings.") (citing *Joint Ventures*, 563 So.2d 622); see also *Palm Beach County v. Tessler*, 538 So.2d 846 (Fla.1989) (recognizing inverse condemnation action where county blocked off access to property located on roadway; reasoning that "there is a right to be compensated through inverse condemnation when government action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself"). This court, in turn, has held that a Florida property owner must pursue a reverse condemnation remedy in state court before his federal takings claim will be ripe, even where that remedy was recognized after [**18] the alleged taking occurred. *Executive 100*, 922 F.2d at 1542 (affirming dismissal of due process takings claim and just compensation claim).

As we have noted above, the Lee County Board of Commissioners decision issued on September 19, 1990 fulfilled the "final decision" requirement of *Williamson*. Several months earlier, however, the Florida Supreme Court recognized an inverse condemnation remedy. Thus, by the time that the "final decision" obstacle was removed from the path

of the Reahards' federal claim, a second obstacle to that claim had been erected [*1418] in the form of a newly-recognized state remedy for inverse condemnation. The Reahards' claim therefore never has become ripe while on the federal court docket; until they have pursued their state remedy, the federal courts are without subject matter jurisdiction. n13

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n13 The Reahards argue that we should disregard the holding in *Joint Ventures* because that opinion was issued subsequent to the removal of the case to federal court in October 1989, and is therefore not relevant. This might be a persuasive argument if subject matter jurisdiction had existed at the time of Lee County's removal to federal court. See *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972) ("Where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is ... whether thefederal district court would have had original jurisdiction of the case had it been filed in that court."); cf. *Bor-Son Bldng. Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir.1978) (party who removes from state court of competent jurisdiction may not later secure dismissal based upon jurisdictional defects in removal court). But in this case, neither the federal nor the state courts ever had jurisdiction until the Board of Commissioners issued its "final decision" on September 19, 1990, long after the removal to federal court. See *Williamson*, 473 U.S. at 191, 105 S.Ct. at 3118-19; *Martinez v. Bolding*, 570 So.2d 1369, 1371 (Fla.Dist.Ct.App.1990), review denied, 581 So.2d 163 (Fla.1991); *Glisson v. Alachua County*, 558 So.2d 1030, 1035-36 (Fla.Dist.Ct.App.) (adopting Federal ripeness doctrine with respect to "final decision" requirement), review

denied, 570 So.2d 1304 (Fla.1990). The date of removal therefore is not dispositive in determining the date on which the claim ripened.

----------End Footnotes----------

[**19]

III.

For the reasons set forth above, we REVERSE the judgment of the district court, and REMAND this case to the district court with instructions to remand the cause to the state court from which it was removed.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD REAHARD and ANN P. REAHARD,
Plaintiffs,

vs.

LEE COUNTY, FLORIDA,
Defendant.

CASE NO. 89-227-CIV-FTM-10D

AMENDED ORDER OF TAKING
FOLLOWING REMAND

This Cause was remanded to this Court from the Eleventh Circuit Court of Appeals for factual findings and a taking analysis in accord with case precedent pursuant to *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). The Eleventh Circuit Court of Appeals also remanded this matter in a supplemental opinion regarding the question of ripeness to determine if the District Court has jurisdiction over this matter. See, *Reahard v. Lee County*, 978 F.2d 1212, (11th Cir. 1992).

FACTS

This is an action for inverse condemnation. The property that is the subject matter of this lititgation is owned by the

plaintiffs, Richard Reahard and Ann Reahard, husband and wife. (tr.trans. p.58) The property is located a half a mile from Bonita Beach is south Lee County near the Bonita Bay Development (tr.trans. p.69, 93) From the Reahards' property there is direct access to the Gulf of Mexico which is approximately one to one and a half miles from the property. (tr.trans. p.93, 94)

Richard Reahard's parents acquired the property from Peninsula Land Company in 1944. Mr. Reahard's parents owned the land until his father's death when the land passed to his mother who owned it until her death at which time Richard Reahard inherited it. (tr.trans. p.60) Richard Reahard then proceeded to give his wife a half interest in the property. (tr.trans. p.59, Pl.exh. 1A, 1B) Richard Reahard's parents paid $1250.00 cash for 540 acres of land (hereinafter "larger tract") in 1944 of which the subject property is a small part, approximately 38 to 42 acres. (tr.trans. p.96, 181) Richard Reahard or his family have paid the taxes on the property since the time they acquired it. (tr.trans. 0.70)

A plat was drawn for the larger tract of property including the subject property in the late 1950's and it was recorded in the public records of Lee County, Florida in 1961. (tr.trans. p.61, 198, see Pl.exh. 3) Richard Reahard became involved in the property development in 1955. (tr.trans. p.61) On the larger tract of land, at first the Reahards did all of the engineering work themselves but later hired Carl Johnson's engineering firm to do the engineering work and develop the plat. (tr.trans. p.62) Johnson engineering staked the lots and laid out the streets and the Reahards proceeded with the digging of the canals and the constructing of the streets. (tr.trans. p.62) The Reahards obtained fill for the property from the canals that were dug from the larger tract. (tr.trans. p.72) Prior to the Lee County Comprehensive Plan of 1984 (hereinafter "Lee Plan"), the Department of Environmental Regulation and the Army Corp of Engineers never denied

permits to the Reahards on the merits of the permits. (tr.trans. p.86, 87) The Reahards developed a brochure regarding the property and advertised the property throughout the country. (tr.trans. p.62, Pl.exh.8) Various surveys were done of the property by Carl Johnson's firms and by Tri-County Engineering (tr.trans. p.63) When Richard Reahard inherited the property, he planned on developing it according to the recorded plat. (tr.trans. p.112, 113, 134)

The individual lots in the larger tract were sold by both a metes and bounds description and by a lot and block description which was taken from the recorded plat. (tr.trans. p.73) The County also used the lot and block description in some of its documents. (tr.trans. p. 73) The subdivision delineated in the plat was never formally accepted by Lee County, however, roads were accepted. (tr.trans. p. 73-4) The County maintains the roads on the larger plat except for one private road. (tr.trans. p. 74) Richard Reahard's parents never fully developed the property prior to the Lee Plan due to their lack of finances to pay for the development. (tr.trans. p.86)

The property is located in a single-family residential area. (tr.trans. p. 601) The type of homes are single-family detached residential dwelling units. (tr.trans. p.601) The older structures were constructed in the late 1950's and early 1960's and are slab on grade construction. (tr.trans. p.601) The newer construction is more oriented to wood frames, stilt construction at elevation of 12 feet above sea level. (tr.trans. p. 601). It is a well maintained area. (tr.trans. p. 605)

The subject property was first formally zoned in 1964 and was zoned RS-1, RM-1, RM-2 and industrial, IL. (tr.trans. p.68, 151 Pl.exh.5A, 5B) RS-1 is single family, RM-1 and RM-2 are multifamily zoning categories and IL which is a light industrial category. (tr.trans. p. 167) Under IL, Mr. Reahard would have been permitted commercial uses, multi-family uses, hotel/motel uses, commercial marina uses, and other types of water uses. (tr.trans. p. 168) The Lee Plan

then changed the zoning to RPA, Resource Protection Area. (tr.trans. p.75, 89, 151) Richard Reahard contacted the County after the zoning change to determine his development choices. (tr.trans. p. 87) According to letters he received from the County he could build one unit per 40 acres. (tr.trans. p. 87, Pl. exh. 10, 11, 15) In addition, the property could be used for passive recreational activities, such as nature trails, canoe trails, and boardwalks (tr.trans. p. 151) Prior to the zoning change, Richard Reahard planned to develop 126 units on the property. (tr.trans. p.75)

The subject property is primarily dominated by mangroves. (tr.trans. p. 292, 562) The subject property is comprised of wetlands which function normally. (tr.trans., p. 562) There is a partially constructed roadway along the northern perimeter that runs from east to west. (tr.trans. p. 292) There is a partially constructed canal along the east side of the property. (*Id.*) There appears to be some mosquito ditching on the property. (*Id.*) There is encroachment of exotic vegetation along the impacted areas (meaning areas with some type of construction which alters the normal hydrology of a site to be different and not supportive of the natural vegetation [tr.trans. p.297, see also p. 483]), primarily along the road and the canal. The exotic species are Australian pines, and Brazilian pepper trees. (*Id.*) There are deposits of fill on the north and west and some on the south side along the existing road. There are some berms that are scattered. (*Id.*) The subject land is partially submerged during high spring tide, during the fall, during the equinox period and during heavy storms (tr.trans. p. 67) Spoils were deposited on the property from finger canals that had been cut into the larger tract disturbing the wetlands ares. (tr.trans. p. 272) There is only one to two areas of land on the subject property that is impacted. (tr.trans. p.572)

The Reahards received two offers for purchase of the property (tr.trans. p. 84) There was an offer to purchase the

property by Andrew Messick for $1.2 millions dollars. (tr.trans 84-85, Pl.exh. 25) Carmen Reahard rejected the offer due to the buyers not paying her any money up front. Essentially the deal was compromised of the potential buyers speculating with her property. (tr.trans. p.85) There was a second offer but none of the details were given. (tr.trans. p. 85) Richard Reahard attempted to sell the property after the Lee Plan was enacted by advertising in the News-Press but was unsuccessful. (tr.trans. p.85) No offers were ever made on these advertisements. (tr.trans. p. 85) In addition, in 1984 Richard Reahard claimed that the property was valued at $30,000 for estate tax purposes which was the value that the tax accessor gave the property. (tr.trans. p.108)

The plaintiff's engineer testified that the property could be developed from 41 to 126 lots. (tr.trans. 298) The appraiser for the plaintiff found that based on comparable sales if the Reahards developed 41 to 43 lots on their property, the value of the property would be $615,000 to $645,000. (tr.trans. 255) If the Reahards were able to develop 126 units on their property, the value of the property would be $2,268,000. (tr.trans. 256). These figures represent the net amount for the property meaning that the costs of development had already been deducted. (tr.trans. p. 254) The plaintiff's expert engineer believed that he could obtain permits from both DER and the Army Corps of Engineers for both the 41 lot or the 126 lot developments. (tr.trans. p. 303) He would use either a sewer plant or septic system for these developments. (tr.trans. p. 308) After the enactment of the Lee Plan, the plaintiff's appraiser estimated the value of the property if one single-family residence was built to be $25,000. (tr.trans. p.274) The plaintiff's environmental consultant, Rayann Boylan testified that once lands are filled they become uplands and then one obtains a permit for the septic tank for an agency other than the Department of Environmental Regulation. (tr.trans. p.696, 706-7) Ms.

Boylan opined that the 43 unit development would be permitable with septic tanks. (tr.trans. p. 707) In addition, Ms. Boylan stated that with the 43 unit development, the property that was not developed could be used as mitigation property and the Reahards would not have to purchase additional lands to mitigate. (tr.trans. p.708)

The defendant's biological expert, Mr. Beever, testified that Department of Environmental Regulation would have taken jurisdiction over this property due to the type of plants that were present. (tr.trans. p. 419) The Department of Environmental Regulation principal function is to be a permitting agency for the State of Florida for development involving environmental impacts such as dredge and fill permits and waste water treatment systems. (tr.trans. p.413) In Mr. Beever's opinion, septic tank permits would have been denied for the 126 unit development. (tr.trans. p.429) Mr. Beever opined that the 43 unit development would more likely be permitted with modification and a possible down-sizing but would not be permitable as was drawn due to the waste water treatment problems. (tr.trans. p. 429, 454) He felt more comfortable that at most 24 units could be developed on the property. (tr.trans. p. 438) Mr. Beever stated that Mr. Reahard could develop houses on his property along the south side of the parcel and along the west side of the canal if he donated the rest of the land for a conservancy-type use and had an off-site sewage system. (tr.trans. p. 465) The defendant's expert engineer, Mr. Hole stated that for the both the 43 units development and the 126 unit development without off-site mitigation, the developments would not have been permitted. (tr.trans. p.481, 483) Mr. Hole testified that he did not believe that the Reahards could obtain permits to build houses along the existing roadway with septic tanks. (tr.trans. p.485) The defendant's expert ecologist stated that neither the Army Corps of Engineers nor the Department of Environmental Regulation would have issued permits for the

126 unit design. (tr.trans. p. 565) He also stated that the 43 unit development was better environmentally than the 126 unit development, however, the 43 unit development would also not be permitted. (tr.trans. p.569) The defendant's appraiser, Mr. Woodward Hanson stated that the highest and best use of the property would be low density residential development which would be one unit on the property. (tr.trans. p. 643, 646) The defendant's second real estate appraiser, Micheal Maxwell stated that in opinion, the value of the subject property of 42 acres prior to Decemebr 21, 1984 (the date of the Lee Plan) was $4,000 per acre for a total of $168,000. (tr.trans. p.659-60) The value of the property after December 21, 1984 is $70,000 for the homesite and $98,000 for the 41 acres of wetlands surrounding the home. (tr.trans. p.664) Therefore, Mr. Maxwell opines that the property's values remained the same before and after the Lee Plan took effect. (tr.trans. p. 670) However, Mr. Maxwell's opinion did not consider the possibility that a 41 unit development could have occurred prior to the Comprehensive Plan but not after. (tr.trans. p.666) Mr. Maxwell was unable to find any comparable property where the homeowner was able to place one homesite on a property and have a 41 acre backyard that is undevelopable. (tr.trans. p.675)

In 1984, Mr. Reahard had two adjacent lots that were north of the subject property and already had fill that could have been used for a swage treatment plant. (tr.trans. p. 692) Mr. Reahard owns other lands that could also be made available for use of a sewage treatment plant. (tr.trans. p. 694)

TAKING

In the case of *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990) the Court identified four types of taking challenges that a land owner may bring: "(1) just compensation

claims; (2) due process takings claims; (3) arbitrary and capricious due process claims; (4) equal protection claims." *Id.* at 720. The Court determined that under a just compensation claim, the plaintiff is not seeking to invalidate the local authority's application of the regulation but simply is requesting monetary compensation for the value of the property taken. *Id.* at 721. Mr. Reahard in his Complaint states that the RPA designation interfered with his reasonable investment-backed expectations and therefore, requested monetary compensation. (Doc. 1) The only issue in this case is "whether an owner has been denied all or substantially all economically viable use of his property. *Eide v. Sarasota County*, 908 F.2d 716, 721 (11th Cir. 1990), See also *Reahard v. Lee County*, 968 F.2d. 1131 (11th Cir. 1992) The Eleventh Circuit stated that this Court must now aply the above facts to the *Penn Central* multifactor inquiry. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)

What constitutes a taking is a problem of "considerable difficulty." *Penn Central* 438 U.S. at 123. The Supreme Court has been unable to determine any set formula for determining when "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. The Supreme Court has identified "several factors that have particular significance" to the question of whether a taking has occurred. *Id.* "The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant consideration. *Id.* (citations omitted)

The Court has carefully considered all of the testimony and exhibits of the parties. There is no question in the Court's mind that the subject property is a pristine wetlands area with few environmental impacts on it. Nonetheless,

according to the plat that was recorded, the Reahards intended to build a 126 unit development prior to the Lee Plan. The property had the proper zoning for such a development namely, RS-1, RM-1, RM-2 and IL which would have permitted the 126 unit density. The only question then becomes whether the Reahards would have been able to obtain permits for this development. Taking all the experts information regarding permitting prior to 1984, it appears very questionable whether the Reahards would have been able to obtain proper permits from the Department of Environmental Regulation and the Army Corps of Engineers for the 126 unit development. It appears that the main problem would have been the sewage or septic tank system needed for this development. However, it is obvious to the Court that the Reahards would then have modified their plans so that permitting would have been available and a plan such as the 41 unit development would have surfaced. According to experts from both parties this development modified with fewer units would have been permitable especially if the Reahards used other uplands tracks of land for the septic or sewage system and donated the remaining land to the State or maintained the remaining land in a pristine wetlands manner.

After the Lee Plan was enacted, the Reahards could build only one unit on the entire tract. The Court does not find credible the defendant's appraiser who stated that the area outside of the homesite would be worth $98,000 to a buyer. Although this property may be pristine, if it is not income producing or usable for some purpose other than recreation it has little or no market value, certainly not $98,000. The only value the land would have is the $25,000 - $70,000 depending on which expert you believe. Therefore, the property with one homesite has very little value. However, if the property were to have a 24 - 41 unit development on it, the property value would be greatly increased possibly to be valued to a net value of including development costs

$645,000 as plaintiff's expert testified. (It is not for the Court to determine at this time the actual value of the property as this case is bifurcated and a jury will decide the amount of loss if any to the Reahards). The Reahards' investment-backed expectations were greatly diminished by the enactment of the Lee Plan and the subsequent change in zoning.

RIPENESS

The Eleventh Circuit Ordered this Court to revisit the issue of ripeness regarding whether the Reahards had pursued all of their state judicial remedies prior to this action as well as their administrative remedies prior to this action.

STATE JUDICIAL REMEDIES

This action was originally filed by the Reahards in the Twentieth Judicial Circuit in and for Lee County, Florida. The defendant petitioned for removal of this action. (Doc.1) Pursuant to the Petition for Removal (Doc. 1), the matter was removed on October 5, 1989. On October 12, 1989, the plaintiffs[1] consented to the removal. (Doc.3)

In the Complaint (Doc.1), the plaintiffs state, "This is an action for inverse condemnation and damages in excess of $5,000." (Complaint, Doc.1, para.1) Clearly from the Complaint, the plaintiffs were requesting money damages and not an invalidation of the zoning ordinance.

The question of whether the Reahards could have brought this action in state court is a question of Florida law. According to the case of *Lee County v. Morales*, 557 So.2d 652, 656 (2nd DCA, 1990),

> a zoning change cannot give rise to a cause of action for inverse condemnantion. [Citations Omitted]

> Thus, even if the zoning ordinance were appropriately found to be confiscatory, appellees would not be entitled to a damage remedy. Where a zoning ordinance is held confiscatory, the only remedy available is to obtain a judicial determination that the ordinance is unenforceable and must be stricken.

The case of *Lee County v. Morales*, was decided on Febuary 28, 1990 which is after the date, October 5, 1989, that the Reahards' case was removed to Federal Court and after the plaintiffs consented to the removal on October 12, 1989. The Eleventh Circuit case of *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) contains a history of Florida law regarding the lack of damage remedies in Florida for inverse condemnation cases particularly involving zoning changes. The Court in *Corn* states:

> we conclude that Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance later declared invalid... As discussed above, the cited authorities are persuasive that the remedy of invalidation is an exclusive one pursuant to Florida law, because zoning is a function of the police power rather than the exercise of eminent domain.
> *Id.* at 1519

Therefore, at the time of removal, the Reahards had no remedy in State Court for inverse condemnation.[2]

ADMINISTRATIVE REMEDIES

According to the Order of Remand, pursuant to the case of *Williamson County Regional Comission v. Hamilton Bank*,

473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Reahards must have exhausted their administrative remedies prior to bringing this law suit.[3] Lee County raises three areas in which they claim the Reahards have failed to exhaust their administrative remedies, namely in the areas of vested rights, equitable estoppel and failure to request a development order.

Vested Rights

Under Chapter XIV, Administrative Interpretations of the 1984 Lee Plan, Section B.(6) (Def. exh. 1A), it provides:

> [V]ested rights shall be deemed to exist where it is clearly shown by the applicant that:
> (a) The applicant has relied on an official affirmative act or omission of a required act of Lee County, within the scope of the County's authority; and
> (b) The applicant has acted in good faith and without knowledge that existing or pending regulations might prohibit or prevent the development expectations claimed to be vested; and
> (c) The applicant has acted to his or her substantial detriment in reliance upon the County's act or approval, and, such that it would be highly inequitable and unjust to destroy the rights he or she has acquired. (Pl. exh. 9A)

This provision also provides that the property owner must have applied for a vested rights administrative determination within six months from the effective date of the Plan. The Lee Plan was enacted on December 21, 1984. The testimony is undisputed that the Reahards failed to apply for a vested rights determination under this provision of the act. (See, Doc. 60, tr.trans. p. 194)

The first question the Court must consider is whether this

Vested Rights provision applied to the Reahards and their property.[4] Under the Vested Rights Provision, the Reahards must have relied on an official affirmative act or omission, acted in good faith and acted to their substantial detriment in reliance upon the County's act or approval and "such reliance would make it highly, inequitable and unjust to destroy the rights" they required.

First, the County must have done an official affirmative act or omission. Lee County's expert, Dr. Gottschalk appeared to have little knowledge of the actual property when he testified that Lee County's affirmative acts were to continue the issue of building permit in the Reahard's subdivision. (Doc. 60, tr.trans. p. 404). These building permits were not done on the subject property which was zoned RPA and the subject matter of the litigation, but rather on a larger tract that the Reahards owned previously. Other than that action by Lee County, Dr. Gottschalk mentioned no other affirmative acts by Lee County other than zoning. Ms. Keyes testified that she was aware of no affirmative acts done by Lee County which would have allowed the Reahards to prevail in an application for Vested Rights. (Doc. 60, tr.trans. p. 194) Mr. Reahard testified that the reason that development was stopped on the property was not that governmental agencies would not give him a permit but rather that his family ran out of money. (tr.trans. p.138) Therefore, there was no testimony to support that the County had done any affirmative acts to the property under the vested rights provision except for the changing of the zoning.

Assuming that the change of zoning was considered an affirmative act, then the question becomes did the Reahards act to their "substantial detriment" in reliance upon the County's act. The Reahards expended considerable amounts of money on the larger tract when developing it. On the subject property, however, it appears that the Reahards put in a partial road and a few other minor changes but did not

expend a great deal of money on the property mainly because Mrs. Reahard lacked the funds to improve the property. According to plaintiff's expert, Ms. Stephanie Keyes who is a land use planner, "the vesting requirements were very strict and related to the amount of money spent on a piece of property and whether or not the county — I believe you had vested rights or vested interest in the property in that you expended considerable sums of money and relied on previous approval of the County." (Doc. 60, tr.trans. p. 165-66) Ms. Keyes interpretation of the Lee County Plan is consistent with the language of the plan in that the Reahards must have relied to their "substantial detriment" under the Lee Plan. Ms. Keyes further stated that it would have been futile for the Reahards to apply under the Vested Rights provision as she knew of other cases where the property owners "had zoning on the property and had not expended large sums of money in bringing forward construction plans and that type of thing, and those application were denied. (Doc. 60, tr.trans. p. 194)

Lee County's expert, Dr. Gottschalk testified that the Reahards could have applied under the Vested Rights provision and that "their opportunity was the same as every other property owner in the County." (Doc. 60, tr.trans.379) Dr. Gottschalk, however, had no opinion regarding whether the Reahards would have prevailed on a vested rights application. (doc. 60,m tr.trans. p. 382)

From the testimony of the experts, it is clear to the Court that the Reahards had not expended sufficient money, nor commenced sufficient development to have prevailed under the Vested Rights provision of the statute had they applied. The Supreme Court does not require that the plaintiffs apply for administrative action that would be futile which would have been true in this case. See, *Eide v. Sarasota County*, 895 F.2d 1326, (11th Cir. 1990).

Equitable Estoppel

Chapter XIII, Procedures and Administration of the 1989 Lee Plan, (Gov. Exhibit 1(B) p.3) provides:

> In other circumstances where development expectations may conflict with the Lee Plan but judicially defined principles of equitable estoppel may override the otherwise valid limitations imposed by the Lee Plan, such expectations may be recognized by Lee County, acting by resolution of its Board of County Commisssioners, on a case-by-case basis.

The Plan sets forth no specific procedures to apply under the "Equitable Estoppel" clause. Although both Lee County and the Reahards articulate reasons why this provision is either applicable or not to the Reahards' property, these arguments are moot in that the Reahards applied under this "Equitable Estoppel" provision. (See, Pl. exh. 21). Although their application was brief, the Lee Plan sets forth no application process and the Court can only assume that the application was valid. In addition, Lee County never responded to the Reahards' application either by denying it for lack of evidence or by denying it on the merits. (tr. trans. p. 187) Therefore, the Reahards exhausted their administrative remedies under the "Equitable Estoppel" clause of the 1989 Lee Plan.

Development Order

Under both Florida Statutes and the Development Standards Ordinance, a development plan for property must be consistent with the comprehensive plan of the county.[5] According to the Lee Plan, the Reahards were restricted to building one unit on their approximate 35 acres. (tr. trans. p.

151) Therefore, to exhaust their administrative remedies, the Reahards had to obtain an amendment to the Lee Plan to develop more than one unit. (tr.trans. p. 159)

Section XIV of the Lee Plan provides for applications for amendments to the Lee Plan for property owners that the Lee Plan affects or affected. (Pl. exh. 1A) The Reahards did apply for a Plan Amendment on January 27, 1988. (Pl. exh. 30). The Plan Amendment then went for a vote before the Lee County Board of County Commisioners who denied the Reahards' request. (tr.trans. p.153) There is no other remedy in which the Reahards could have changed the Lee Plan property designation. (tr.trans. p. 158) In addition, the Reahards obtained a Development Order that was consistent with the Lee Plan and permitted them to construct one single family dwelling on their property. (tr.trans p. 185) The Court then concludes that since Lee County denied any amendment other than one single family unit of the subject property, and that the statutory law requires that any development be consistent with the Lee Plan, that the Reahards have indeed exhausted their administrative remedies for a Developmental Order.

Therefore, it is hereby ORDERED:

1. That the plaintiffs have exhausted both their administrative and judicial remedies prior to filing this action.

2.That a taking of the subject property occurred when the Lee County Comprehensive Plan was enacted causing a great diminution in the plaintiffs' investment-backed expectations.

DONE and ORDERED in Chambers, Fort Myers, Florida, this 22nd day of April, 1993.

George T. Swartz
United States Magistrate Judge

ENDNOTES

[1]Although, the plaintiff, Ann Reahard was added after the Petition for Removal was filed (Doc.9), for ease this Court will refer to both plaintiffs throughout as the addition of Ann Reahard did not impact the issue of ripeness.

[2]The Florida Supreme Court in April of 1990, subsequently ruled that "the state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner." *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990). However, this decision was subsequent to the removal in the case at bar.

In its Reply to Reahard's Memorandum on Subject Matter Jurisdiction (Doc. 129), Lee County argues that the Supreme Court in the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), held that the just compensation clause of the Fifth Amendment mandates that a state provide just compensation for confiscatory zoning regulation. This decision was decided prior to the instant case being removed to federal court. In the *First English* case, however, the Supreme Court clearly states, "[W]e limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* at 321, 2389. Therefore, the holding was limited to the facts in the *First English* case. In addition, for all practical purposes, the Reahards could not have brought the case in Florida Courts due to the ruling in *Lee*

County v. Morales, 557 So.2d 652, 656 (2nd DCA, 1990).

[3]The Reahards did apply for a determination of error which would permitted the County to re-examine the subject property to determine if the RPA classification was wrong. (tr.trans. p. 88, pl. exh. 12)) The County determined there was no error in their classification. (tr.trans. p.89)

[4]Although the plaintiffs allege that Lee County did not raise the exhaustion of the vested rights provision in an affirmative defense and have therefore waived it, the Court must consider the merits of the vested rights provision as it applies to the plaintiffs. The question of exhaustion of remedies lies within the parameters of subject matter jurisdiction and the Eleventh Circuit stated that the question of subject matter jurisdiction must be investigated whether or not it is raised by the parties.

[5]Development Standards Ordinance provides in part "in no case may the density (of a parcel of property) exceed the allowable density as set forth in the comprehensive plan or the zoning ordinance." Development Regulations (Doc. 53, exh. 5).

Florida Statute §163.3194(1) (a) provides:

> After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such pan or element shall be consistent with such plan or element as adopted.

United States District Court
Middle District of Florida
Fort Myers Division

RICHARD REAHARD and
ANN P. REAHARD,

Plaintiffs,

vs.

LEE COUNTY, FLORIDA,

Defendent.

Case No. 89-227 Civ-FTM-10C

ORDER

THIS CAUSE being heard on the Motion of the Plaintiffs to reinstate the Final Judgement, and the Court being fully advised in the premises, and having received memoranda of law from the parties, it is hereby

ORDERED AND ADJUDGED that the previous Final Judgement of this Court dated June 6, 1991, a copy of which is attached hereto, is hereby reinstated nunc pro tunc.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 3rd day of May, 1993.

GEORGE T. SWARTZ
U. S. Magistrate

APPENDIX C

Richard REAHARD; Ann P. Reahard, Plaintiffs-Appellees,
v.
LEE COUNTY, Defendant-Appellant.

REAHARD v. LEE CTY.

No. 91-3593.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

978 F.2d 1212; 1992 U.S. App.
LEXIS 32107; 23 ELR 20369; 6

Fla. Law W. Fed. C 1371

December 8, 1992, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida. Addendum to Opinion Dated August 14, 1992, Reported at 1992 U.S. App. LEXIS 18629. DISTRICT BANKRUPTCY COURT DOCKET NO. 89-227-Civ-FTM-10C. D/C Judge SWARTZ

COUNSEL: For Plaintiffs-Appellees: Garvin & Tripp, P.A., Jeffrey Richard Garvin, Theodore L. Tripp, P.O. Drawer 2040, Ft. Myers, FL 33903, (813)334-1824.

For Defendant-Appellant: John J. Renner, Asst. Lee County Attorney, P.O. Box 398, Fort Myers, FL 33902, (813)335-2236. Robert N. Reynolds, Suite 1000, One Datran Center,

9100 So. Blvd., Miami, FL 33156. Helena Schwartz, AG, Jonathan A. Glogau, Special Projects Div., 111-36 South Magnolia Drive, Tallahassee, FL 32301, (904)488-5899.

For AMICUS: of BROWARD COUNTY: Melissa P. Anderson, Governmental Center, Suite 423, 115 So. Andrews Ave., Ft. Lauderdale, FL 33301, (305)357-7600. For 1000 Friends of Florida, Inc.): Gibson & Lilly, Robin Gibson, P.O. Box 1199, Lake Wales, FL 33859. For RGMC and COTI: Thomas W. Reese, 123 Eighth Street North, St. Petersburg, FL 33701, (813)822-4084. For FLORIDA LEAGUE OF CITIES: Harris Morrison, Jr., 201 W. Park Ave., Tallahassee, FL 32302, 904-222-9684. For FLORIDA ASSOC. OF COUNTIES & FLORIDA ASSOC. OF COUNTY ATTYS: John J. Dingfelder, P. O. Box 1110, Tampa, FL 33601. For National Assn. of Home Builders - Amicus for Appellee: William H. Ethier, 15th & M. Streets, NW, Washington, DC 20005, 202/822-0359. For Florida Citrus Mutual - Amicus for Appellee: Joseph J. Gleason, V-P Staff Legal Counsel, P.O. Box 89, Lakeland, FL 33802, 813/682-1111. For Southeastern Legal Foundation, Inc. - Amicus for Appellees: G. Stephen Parker, President, Deborah A. Ausburn, The Southeastern Legal Foundation, Inc., 2900 Chamblee-Tucker Road, Building 4, Atlanta, GA 30341, 404/458-8313. For Florida Dairy Farmers, Inc., Fla. Land Council, Fl. Farm Bureau Federation & FL Cattlemen's Association - Amicus for Appellees, Hart, Fuller & Smith, PA, Marty Smith, P.O. Box 2120, Ocala, FL 32678, 904/732-9253. For Pacific Legal Foundation - Amicus for Appellees: Robin L. Rivett, Pacific Legal Foundation, 2700 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833-3501, 916/641-8888. For Defenders of Property Rights - Amicus for Appellees: Leonard A. Leo, Nancie G. Marzulla, Defenders of Property Rights, 6235 33rd St., NW Washington, DC 20015, 202/686-4197.

JUDGES: Before FAY and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

OPINIONBY: FAY

OPINION: [*1213] FAY, Circuit Judge:

The original opinion in this case is published at 968 F.2d 1131 (11th Cir.1992). However, upon further review of this matter, the court is concerned about the question of subject matter jurisdiction. We are aware that the United States magistrate judge denied Lee County's motion to dismiss for lack of ripeness, and the parties did not raise the issue on appeal. However, ripeness is a question of subject matter jurisdiction. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 7 (11th Cir.1989). We always must investigate questions of subject matter jurisdiction, whether or not they are raised by the parties to the case. *Fitzgerald v. Seaboard System* R.R., 760 F.2d 1249, 1251 (11th Cir.1985).

Therefore, we supplement our original opinion to instruct the magistrate judge to revisit the question of ripeness on remand and determine [**2] whether the district court has jurisdiction over this matter. We recognize that in this case, the question of subject matter jurisdiction is quite fact specific. There is some question regarding the Reahards' efforts to secure appropriate administrative remedies. This was touched upon but not developed. Moreover, there is nothing in the record regarding the judicial remedies available in Florida state courts, or the Reahards' pursuit of those remedies. Assuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and there is no subject matter jurisdiction.

We instruct the magistrate judge, on remand, to develop

these factual issues fully, make relevant factual findings, and determine [*1214] whether the district court has jurisdiction over this matter.

APPENDIX D

Richard REAHARD; Ann P. Reahard,
Plaintiffs-Appellees,
v.
LEE COUNTY, Defendant-Appellant.

REAHARD v. LEE CTY.

No. 91-3593.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

968 F.2d 1131; 1992 U.S. App.
LEXIS 18629; 22 ELR 21455; 6

Fla. Law W. Fed. C 991

August 14, 1992, Decided

SUBSEQUENT HISTORY: Addendum Opinion of December 8, 1992, Reported at 1992 U.S. App. LEXIS 32107.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida. DISTRICT/BANKRUPTCY COURT DOCKET NO.
89-227-Civ-FTM-10C 10-5-89. D/C Judge SWARTZ

DISPOSITION: We VACATE the judgment and REMAND this case for new proceedings consistent with this opinion.

COUNSEL: For Defendant-Appellant: John J. Renner, Asst. Lee County Attorney, P.O. Box 398, Fort Myers, FL 33902, (813) 335-2236. Robert N. Reynolds, Suite 1000, One Datran Center, 9100 So. Blvd., Miami, FL 33156. Helena Schwartz, AG, Jonathan A. Glogau, Special Projects Div., 111-36 South Magnolia Drive, Tallahassee, FL 32301, (904) 488-5899.

For AMICUS of BROWARD COUNTY: Melissa P. Anderson, Governmental Center, Suite 423, 115 So. Andrews Ave., Ft. Lauderdale, FL 33301, (305) 357-7600. For 1000 Friends of Florida, Inc.: Gibson & Lilly, Robin Gibson, P.O. Box 1199, Lake Wales, FL 33859. For RGMC and COTI: Thomas W. Reese, 123 Eighth Street North, St. Petersburg, FL 33701, (813) 822-4084. For Florida Association of Counties and Florida Association of County Attorneys: John J. Dingfelder, P.O. Box 1110, Tampa, FL 33601. For National Assn. of Home Builders - Amicus for Appellee: William H. Ethier, 15th & M Streets, NW, Washington, DC 20005, 202/822-0359. For Florida Citrus Mutual - Amicus for Appellee: Joseph J. Gleason, V-P, Staff Legal Counsel, P.O. Box 89, Lakeland, FL 33802, 813/682-1111. For Southeastern Legal Foundation, Inc. - Amicus for Appellees: G. Stephen Parker, President, Deborah A. Ausburn, The Southeastern Legal Foundation, Inc., 2900 Chamblee-Tucker Road, Building 4, Atlanta, GA 30341, 404/458-8313. For Florida Dairy Farmers, Inc., Fla. Land Councuil, Fl. Farm Bureau Federation & FL Cattlemen's Association - Amicus for Appellees: Hart, Fuller & Smith, PA, Marty Smith, P.O. Box 2120, Ocala, FL 32678, 904/732-9253. For Pacific Legal Foundation - Amicus for Appellees: Robin L. Rivett, Pacific Legal Fondation, 2700 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833-3501, 916/641-8888. For Defenders of Property Rights - Amicus for Appellees: Leonard A. Leo, Nancie G. Marzulla, Defenders of Property Rights, 6235 33rd

St., NW, Washington, DC 20015, 202/686-4197. For Plaintiffs-Appellees: Garvin & Tripp, P.A., Jeffrey Richard Garvin, Theodore L. Tripp, P.O. Drawer 2040, Ft. Myers, FL 33903, (813) 334-1824.

JUDGES: Before FAY and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

OPINIONBY: FAY

OPINION: [*1132]

FAY, Circuit Judge:

Appellant Lee County, a political subdivision of the State of Florida, appeals a magistrate judge's order finding that the adoption of the Lee County Comprehensive Land Use Plan resulted in a taking of Appellees Richard and Ann Reahard's property under the Fifth and Fourteenth Amendments to the United States Constitution. Because the magistrate judge misapplied the legal standard for partial takings and failed to make adequate factual findings, we VACATE the order and REMAND for new proceedings consistent with this opinion. [*1133]

I. BACKGROUND

This case concerns roughly forty acres of waterfront land located in Lee County, Florida, with direct river access to the Gulf of Mexico. These forty acres were once part of a larger parcel of approximately 540 acres that were purchased in 1944 by the parents of the plaintiff, Richard Reahard. Through the mid-1970's, the Reahard family subdivided, developed, and sold tracts of the 540 acre parcel, retaining the approximately forty acres at issue. Richard Reahard,

who inherited [**2] the site in November of 1984, sought to continue development of the site as a single-family subdivision. In December of 1984, however, the Lee County Comprehensive Land Use Plan ("Lee Plan") went into effect and classified the Reahard's property as a Resource Protection Area ("R.P.A."). This designation limited development of the parcel to a single residence, or for uses of a "recreational, open space, or conservation nature." (Pl.Ex. 9-A).

On September 1, 1989, Reahard n1 filed a complaint in the Twentieth Judicial Circuit Court of the State of Florida alleging that Lee County's designation of his property as an R.P.A. in the Lee Plan was a valid exercise of Lee County's police power but constituted a taking under sections 163.3194(4)(b) and 380.08 of the Florida Statutes, under Article X, Section 6 of the Florida Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. Lee County answered the complaint and affirmatively alleged that Reahard failed to exhaust administrative remedies, that the claim was not ripe for adjudication, and that the claim was barred by the statute of limitations. Following the filing of a petition for removal by Lee [**3] County, the case was removed from state court to federal court.

----------Footnotes----------

n1 Richard Reahard's wife, Ann Reahard, was added as a party after the filing
of this action.

----------End Footnotes----------

The parties agreed to have the matter heard before a United States magistrate judge. n2 The issues of liability and damages were bifurcated. The non-jury trial on liability, or on

whether a taking had occurred, began on November 26, 1990 and concluded on November 28, 1990.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Parties may consent to have a United States magistrate judge "conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves," pursuant to 28 U.S.C. @ 636(c)(1).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

During the trial numerous witnesses were called, including Richard Reahard, representatives of Lee County, the Florida Department [**4] of Environmental Regulation ("DER"), and the Army Corps of Engineers, land use planners and consultants, and property appraisers. Evidence was introduced concerning the initial title acquisition of the subject property, e.g., (R10:60, 95-96), the property's history of subdivision, sale, and development, e.g., (R10:96-98, 117, 120-23), the record of permitting, e.g., (R10:82, 102, 125-26; Pl.Ex. 17, 22), how and when Reahard inherited the land, e.g., (R10:60, 82), the topography and extent of the property, e.g., (R10:65-67), the site's history of zoning and regulation, e.g., (Pl.Ex. 9-A; Def.Ex. 1-A), value appraisals after the enactment of the Lee Plan, e.g., (R11:274), development of similarly designated "wetland" areas, (R11:215-16), and the Reahard's investment expectations, e.g., (R10:87).

Much of this evidence was in dispute n3 and nearly all of it relevant to whether a taking had occurred. Despite the complexity of the evidence, however, the magistrate judge, in an order issued on January 16, 1991, limited his factual findings to the following:

----------Footnotes----------

n3 For example, the parties disputed whether DER would have issued permits for development, the extent to which the R.P.A. classification affected the reasonable economic use of the land, and the value of the property after the enactment of the Lee Plan.

----------End Footnotes----------

[**5]

1. No cause of action arose in the case until January 31, 1989, when Lee County finally denied Plaintiff's application for plan amendment, and therefore, the four year Statute of Limitations did not begin running until that date.
[*1134]

2. There was no vesting of any property rights due to any official affirmative act or omission on the part of Defendant, Lee County, or its agents, such as would have entitled Plaintiffs to exemption from the operation of the Lee County Comprehensive Land Use Plan, hereinafter referred to as the "Lee Plan." Because there was no official affirmative acts or omissions on the part of Lee County, any application under the vested rights provision of the Lee Plan would have been futile.

3. Plaintiffs have filed an application for amendment to the Lee Plan, an application for administrative determination of error, and an application under the minimum use or single family residence provision of the Lee Plan and, as a result, have exhausted all administrative remedies.

4. Defendant, Lee County, upon application by the Plaintiffs, has entered a development order permitting the Plaintiffs to place one (1) single family unit on the approximately

40-acre tract which is [**6] the subject of this litigation. Development of some of the property could have occurred were it not for the enactment of the Lee Plan and subsequent development order.

5. As a result of the adoption of the Lee Plan, there was a substantial deprivation of the value of Plaintiffs' property resulting in a taking of Plaintiffs' property with the loss of use to Plaintiffs dating back to the effective date of the County's adoption of the Lee Plan on December 21, 1984.

(R5:56-1-3).

Immediately after entry of these findings, Lee County appealed directly to this court. n4 The appeal was dismissed as premature pending determination of damages, which subsequently went to trial before a jury on May 7, 1991. Two weeks later, on May 21, 1991, the jury returned a verdict in favor of the Reahards for $ 700,000, plus interest at 6.07% accrued from December 21, 1984. The final judgment was amended on June 6, 1991 to award interest at 12% and to require the Reahards to execute and deliver to Lee County a fee simple deed conveying their interest in the subject property to Lee County.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 Under 18 U.S.C. @ 636(c)(3), "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[**7]

Lee County once again appealed directly to this court. We issued an order advising the parties that we would await the Supreme Court's review of *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895, cert. granted, U.S. ——, 112 S. Ct. 436, 116 L. Ed. 2d 455 (1991), before deciding this appeal. As the Supreme Court has recently ruled in *Lucas v. South Carolina Coastal Council*, U.S. ——, 112 S. Ct. 2886, L. Ed. 2d —— (1992), reversing, 304 S.C. 376, 404 S.E.2d 895 (1991), we address the present appeal. n5

----------Footnotes----------

n5 Although we awaited the release of *Lucas*, the Court left open how the categorical takings rule set forth in its opinion applies to situations in which a part of a landowner's property is rendered unusable by a regulation. See U.S. at —— n. 8, 112 S. Ct. at 2895 n. 8 ("Such an owner [whose land diminishes in value by 95%] might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally. It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full." (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978)).

----------End Footnotes----------

[**8]

II. DISCUSSION

The magistrate judge's order of January 16, 1991 cannot

stand because it misapplies the legal standard regarding partial takings and wholly fails to set forward factual findings necessary to support a decision that a taking has occurred.

Recently, in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.1990), cert. denied, U.S. ——, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991), we identified four types of taking challenges that a land owner [*1135] may bring: (1) just compensation claims; (2) due process takings claims; (3) arbitrary and capricious due process claims; and (4) equal protection claims. Id. at 720. This challenge falls within the first category: a claim for just compensation. In *Eide*, we noted that a just compensation claim, as opposed to the other types of claims, does not seek "an invalidation of the local authority's application of the regulation," id. at 721, but simply monetary compensation for the value taken. In his complaint, Reahard conceded that "the action of Lee County in classifying Plaintiff's land as Resource Protection Area is a valid exercise of the [**9] police power of Lee County." n6 (R1:1 "Complaint and Demand for Jury Trial" at 3). He asserts, however, that the R.P.A. designation sufficiently interfered with his reasonable investment-backed expectations that monetary compensation is warranted.

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n6 The Reahards now argue that "there is no evidence that the proposed development of this property by Mr. and Mrs. Reahard would cause any substantial harm [sic] the public, generally, or the environment, in specific," Brief for Appellees at 15, thus raising the factual issue of whether the R.P.A.'s application substantially advanced legitimate state interests. We will not consider this issue as it is raised for the first time on appeal. *Pierre v. United States*, 525 F.2d 933, 936 (5th Cir.1976).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The question inherent in a "just compensation" claim is whether the regulation goes so far as to be a taking. n7 See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67, 67 L. Ed. 322 L. Ed. 322 (1922) ("The general [**10] rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Admittedly, there has been much confusion as to when a regulation goes too far in a partial takings case. In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Supreme Court recognized that it has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124, 98 S. Ct. at 2659. Instead, the Court held that takings decisions depend largely upon the particular circumstances in each case and that each case is to be decided on an ad hoc, factual basis. *Id.*

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n7 The threshold question, of course, is whether the just compensation claim is ripe for review. As we made clear in Eide,

> in order for such a claim to be ripe for adjudication, the landowner must overcome two hurdles: the final decision hurdle and the just compensation hurdle. The landowner must obtain a final decision regarding the application of the zoning ordinance or regulation to his or her property and utilize state procedures which provide for obtaining just compensation. The final decision requirement includes a requirement that the property owner seek variances from the applicable

> regulations. The reason for the final decision requirement is that one of the factors significant to the adjudication of a just compensation claim is "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." This impact and interference cannot be ascertained until the local authority has determined the nature and extent of the development that will be permitted. In addition to the final decision requirement, a Fifth Amendment just compensation claim is not ripe until the landowner has pursued the available state procedures to obtain just compensation.

908 F.2d at 720-21 (citations omitted).

Here, the magistrate judge found that the Reahards exhausted all administrative remedies prior to their just compensation claim. (R5:56 at 2).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

[**11]

The *ad hoc* inquiry requires no more than an application of the law to the peculiar facts. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), the Supreme Court restated two tests to be used in analyzing takings claims. The first test is whether a particular regulation substantially advances a legitimate state interest. 483 U.S. at 834, 107 S. Ct. at 3147; *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). If the regulation does not substantially advance a legitimate state interest, it can be declared invalid. The second test is whether a regulation denies an owner economically viable use of his property. 483 U.S. at 834, 107 S. Ct. at 3147; 447 U.S. at 260, 100 [*1136] S. Ct. at

2141. In *Nollan*, the Court found that the California Coastal Commission's imposition of an access-easement condition failed the first test and thus violated the takings clause. 483 U.S. at 835-39, 107 S. Ct. at 3147-50. [**12] The Court did not reach the second test.

Here, the first test set forth in *Nollan* is bypassed because a claim for "just compensation" (the first type of claim identified in *Eide*) necessarily involves a regulation that substantially advances a legitimate government interest. Just compensation claims admit and assume that the subject regulation substantially advances a legitimate government interest; the validity of the regulation is not at issue. Thus, given no claim that state common law would permit particular use restrictions without compensation, the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property. See *Eide*, 922 F.2d at 721; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874, 81 L. Ed. 2d 815 (1984) (recognizing that governmental action "so complete as to deprive the owner of all or most of his interest" can amount to a taking) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 359, 89, 89 L. Ed. 311 L. Ed. 311 (1945)).

In order to resolve [**13] the question of whether the landowner has been denied all or substantially all economically viable use of his property, the factfinder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations. *Bowen v. Gilliard*, 483 U.S. 587, 606, 107 S. Ct. 3008, 3019, 97 L. Ed. 2d 485 (1986); *Hodel v. Irving*, 481 U.S. 704, 713-14, 107 S. Ct. 2076, 2081-82, 95 L. Ed. 2d 668 (1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 516, 107 S. Ct. 1232, 1258, 94 L. Ed. 2d 472 (1986); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348-49,

106 S. Ct. 2561, 2565-66, 91 L. Ed. 2d 285 (1986); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868 (1981); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75, 100 S. Ct. 383, 389-390, 62 L. Ed. 2d 332 (1979); *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659; [**14] see *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1410 (11th Cir.1989). This analysis must be explored in light of developing case law that has shaped and defined the meaning of these factors.

In the instant case, the magistrate judge, serving as factfinder, n8 did not analyze the factors noted above, nor did he set forth factual findings necessary for such an analysis. In this context, a proper takings analysis would address a number of questions. In this case, those questions are: (1) the history of the property — when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; (2) the history of development — what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; (3) the history of zoning and regulation — how and when was the land classified? How was use proscribed? What changes in classifications occurred?; (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were [**15] the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of the neighboring landowners under state common law?; and (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation? Once such facts are determined, an application of these facts under the Penn Central multifactor inquiry would follow. Here, the magistrate judge simply concluded, without any findings or

analysis, that "as a result of the adoption of the Lee Plan, there was a substantial [*1137] deprivation of the value of Plaintiffs' property resulting in a taking." (R5:56 at 2).

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n8 We note, of course, that had this matter been before a jury, the relevant inquiry would have concerned whether the instructions properly charged the jury.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

Given the lack of both factual findings and a takings analysis in accord with case precedent, we VACATE the judgment and REMAND this case for new proceedings consistent with this opinion. [**16] n9

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n9 During the pendency of this appeal, Lee County filed a motion to dismiss based upon mootness noting that it had filed a condemnation case in state court. Our inquiry resulted in being advised that the condemnation case was "pending." We suggest that the magistrate judge make appropriate inquiry regarding such litigation. If such an action has been completed, this case would be moot.

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APPENDIX E

United States District Court
MIDDLE DISTRICT OF FLORIDA

AMENDED JUDGEMENT IN A CIVIL CASE

RICHARD REAHARD and ANN REAHARD

V.

LEE COUNTY, a political
subdivision of the State of Florida

CASE NUMBER: 89-227-CIV-FTM-10(C)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the amount to be paid by the defendant, LEE COUNTY, to the plaintiffs, RICHARD REAHARD and ANN REAHARD, as full compensation for the property taken is $700,000.00 plus interest accrued from 12/21/84 until 5/13/91, at the rate of 12%.

Plaintiffs, upon tender of the amount of this judgement shall execute and deliver to Defendant, LEE COUNTY, a fee

simple deed conveying their interest in the subject property to the Defendant.————————

June 6, 1991

DAVID L. EDWARDS
Clerk